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NO. .....

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THEODORE KOEHLER, Warden,

Petitioner,

v

TILDEN N. ENGLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this case presents an important question of federal law with regard to the applicability of *Cupp* v *Naughten*, 414 US 141 (1973), to jury instructions allegedly violative of *Sandstrom* v *Montana*, 442 US 510 (1979).

II. Whether this case presents a significant question of federal law with respect to the application of the *Chapman* v *California*, 386 US 18 (1967), harmless error test to allegations of constitutional defect in jury instructions.

III. Whether this case presents an important federal question with regard to the applicability of *Wainwright* v *Sykes*, 433 US 72 (1977), where there is no objection at trial or on direct appeal to the jury instructions at issue.

IV. Whether the extent to which *Sandstrom* v *Montana*, 442 US 510 (1977), applies to cases tried prior to its decisional date presents an important question of federal law which has produced conflict in the courts of appeals.

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In The

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THEODORE KOEHLER, Warden,

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TILDEN N. ENGLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Respondent Engle was convicted of first degree premeditated murder in July, 1973, after a jury trial in the Recorder's Court for the City of Detroit. He was thereafter sentenced to life imprisonment without parole. The Michigan Court of Appeals affirmend Respondent's conviction and the Michigan Supreme Court thereafter denied leave to appeal. *People* v *Engle*, 61 Mich App 628(1975), *lv den* (without opinion), 402 Mich 929 (1978). The same courts thereafter denied applications for leave to appeal. *People* v *Engle*, unpublished order dated August 30, 1978 (Docket No. 78-2485); *lv den* (without opinion), 406 Mich 870 (1979). Federal District Judge Douglas W. Hillman of the Western District of Michigan denied Respondent's petition for a writ of habeas corpus in a written opinion dated May 4, 1982. Appendix 1a. On Respondent's appeal from Judge Hillman's decision, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case with instructions to grant the writ. *Tilden N. Engle* v *Theodore Koehler*, ... F2d .... (No. 82-1470, filed May 9, 1983). Appendix 14a.

JURISDICTION

Petitioner seeks review of the Court of Appeals opinion filed May 9, 1983. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

MCL 750.316; MSA 28.548:

> All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCL 769.26; MSA 28.1096:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Michigan General Court Rules 1963, 516.2:

> Objections. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the

grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Respondent Engle was found guilty of first degree murder in the December 7, 1972 shooting death of Regis Lantzy at a Detroit automobile plant.

Respondent did not dispute the homicide at trial, but instead presented a defense of temporary insanity.

Trial evidence established that Respondent had been laid off from his assembly line job on December 4, 1972. (245).[1] He received information that his foreman, the decedent, had precipitated his event. (250).

Respondent returned to the plant at approximately 9:00 p.m. on December 7, 1972. (I, 11-12). He informed his nephew, Renus Engle, that "he was going to kill a guy". (I, 13). Renus Engle described Respondent as crying and with a nervous pitch to his voice. (I, 21). He also stated that Respondent was drinking but not drunk. (I, 28).

At approximately 9:35 p.m. Respondent entered foreman Lantzy's office where he encountered clerk Donald Ambrose. Respondent asked for Lantzy. Ambrose advised Respondent that Lantzy was temporarily absent but was to return shortly. Ambrose offered to find Lantzy. Respondent, however, said "I'll go find him" and then left. (38-41). Ambrose described Respondent as appearing troubled with a strange look in his

---

[1] Arabic numbers refer to consecutively numbered pages of the trial transcript contained in volumes two through five. A Roman numeral one designates pages appearing in the separately numbered first volume of the trial transcript.

eyes, but also coherent and polite. (40-42; 56). Ambrose did not detect any odor of alcohol on Respondent's breath. (56).

A short time later, at approximately 9:45 p.m., Cornelius Matthews and William Richardson saw Respondent talking to Lantzy. (I, 54; 20). Respondent then shot Lantzy who began to run. (I, 55; 21-22). Respondent shot again and Lantzy fell. Respondent shot Lantzy twice more, stood over the body and then walked away. (I, 55-56). Another worker, Charles Yates, also witnessed a portion of the attack. (I, 70-71).

Respondent returned to Ambrose's office and stated that he had killed Lantzy because the latter had "fucked over him". (42-43). When plant security officer Samuel Mays arrived at the office, Respondent gave him the gun and admitted shooting Lantzy. (66, 76). Mays detected an odor of alcohol on Respondent's breath but found Respondent coherent. (67).

Detroit police officer Richard Ren arrived next, took custody of Respondent and advised him of his rights. (88-90). Neither Ren nor his partner, Officer Onorio Catenacci, detected alcohol odor and both observed that Respondent was very calm. (94-95; 127). Respondent described the shooting in detail to Ren. He then stated that he had ceased firing because he believed Lantzy was dead and he did not want to kill anyone else. (106-107). Respondent gave a written version of his admissions to Detroit Police Officer Daniel Nold on the following day. (159-160; 161-162).

Respondent testified that he had no memory of the incident except a nightmarish image of Lantzy with blood gushing from his mouth. (258; 311-312). He claimed he started drinking after his layoff on December 4 and had taken four librium pills on December 7. (257).

Dr. Mary Ansley, a psychiatrist, testified for Respondent and

opined that Respondent lacked behavioral control on the night in question due to a mental disorder. (351-359). In rebuttal psychiatrist Ervin Edgar testified that, though Respondent was a chronic alcoholic, he had not experienced a disassociative reaction or an irresistible impulse and knew right from wrong when he killed Lantzy. (415-419, 434).

Aside from general instructions on the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt and the elements of the offense, the trial court charged the jury as follows on the issues of malice and intent:

> Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, malice is implied from any deliberate and cruel act against another person, however sudden.
>
> Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.
>
> We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts. It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may

properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or not the wounds were wounds caused by holding the weapon directly against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt.

670-671.

With regard to the defense of insanity the court stated as follows:

Ladies and gentlemen you have heard evidence in this case; you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at the time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident.

677.

There were no objections to the court's instructions.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WITH REGARD TO THE APPLICABILITY OF CUPP v NAUGHTEN, 414 US 141 (1973), TO JURY INSTRUCTIONS ALLEGEDLY VIOLATIVE OF SANDSTROM v MONTANA, 442 US 510 (1979).

In this case the Court of Appeals purported to evaluate an alleged *Sandstrom* violation in accordance with the dictates of *Cupp* v *Naughten*, 414 US 141 (1973). The court, however, effectively read the instructions at issue in "artificial isolation" and found constitutional error.

The jury instruction condemned in *Sandstrom* was devoid of ameliorative, explanatory or curative language. This court properly noted that general admonitions as to burden of proof and reasonable doubt were not "rhetorically inconsistent", id., 442 US 518-519, n. 7, with this charge and, therefore, could not have mitigated its erroneous impact. There was simply no other context for appellate review in *Sandstrom*.

This case presents an entirely different situation. Here the court gave the presumption of intent as a "rule of thumb". The court then explained to the jury that they must determine intent beyond a reasonable doubt based on a variety of enumerated factors. Petitioner submits that the complete instruction on intent in this case was rhetorically inconsistent with the concept of a conclusion presumption or a shift of the burden of proof to the defendant.

In analogous circumstances, Courts of Appeals in other circuits have refused to find constitutional error in the presence of qualifying or explanatory language associated with a *Sand-*

strom-type instruction. See *Brayboy* v *Scully*, 695 F2d 62 (2nd Cir, 1982); *Niziolek* v *Ashe*, 694 F2d 282 (1st Cir, 1982); *Rock* v *Coombe*, 694 F2d 908 (2nd Cir, 1982), *cert den*, ... US .... (1983). The Court of Appeals here found these cases and others factually distinguishable and declined comment on their correctness. *Engle* v *Koehler*, *supra*, sl. op., p. 8, n. 4. This Court should grant certiorari to provide the necessary guidance for proper application of *Cupp* v *Naughten* to alleged *Sandstrom* errors.

II.

THIS CASE PRESENTS A SIGNIFICANT QUESTION OF FEDERAL LAW WITH RESPECT TO THE APPLICATION OF THE CHAPMAN v CALIFORNIA, 386 US 18 (1967), HARMLESS ERROR TEST TO ALLEGATIONS OF CONSTITUTIONAL DEFECT IN JURY INSTRUCTIONS.

The Court of Appeals in this case noted that this Court is equally divided with respect to the appropriate harmless error test for *Sandstrom* violations. *Connecticut* v *Johnson*, 103 S Ct 969 (1983). One plurality would carefully examine the weight of the prosecutor's case while the other would find error unless the accused affirmatively conceded the issue of intent. The Court of Appeals in this case chose to apply a fundamentally different harmless error test. *Engle* v *Koehler*, sl. op., p. 9-10. See *Conway* v *Anderson*, 698 F2d 282, 284 (6th Cir, 1983).

The test applied in the case at bar does not focus on either the strength of the prosecution's case or the nature of the constitutional error. Instead, the only inquiry is whether the defendant's *mens rea* was an issue in the case. Thus, if the defendant places his mental state in issue, a *Sandstrom* error can never be held harmless.

Petitioner submits that this harmless error test represents a departure from *Chapman* v *California, supra.* The *Chapman* test, properly understood, endeavors to evaluate the impact of constitutional error in light of the case as a whole. The *Engle/Conway* test studiously avoids all the circumstances of the case save one—the defense raised at trial.

It is imperative that this Court grant certiorari to define the appropriate harmless error test applicable to *Standstrom* violations.

III.

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION WITH REGARD TO THE APPLICABILITY OF WAINWRIGHT v SYKES, 433 US 72 (1977), WHERE THERE IS NO OBJECTION AT TRIAL OR ON DIRECT APPEAL TO THE JURY INSTRUCTIONS AT ISSUE.

There was no contemporaneous objection at trial to the jury instructions later claimed to violate the dictates of *Sandstrom* v *Montana, supra.* Moreover, Respondent failed to raise the *Sandstrom* issue on his direct appeal. *People* v *Engle,* 61 Mich App 628 (1975).

Under Michigan law, a contemporaneous objection is necessary to preserve a claim of error in jury instruction for appellate review. GCR 1963, 516.2; MCL 769.26; MSA 28.1096. Moreover, the law of the case doctrine generally applies to preclude consideration of issues presented for the first time on successive appeals. *People* v *Tubbs,* 64 Mich App 341 (1975), (concurring opinion); *People* v *Bergin,* 63 Mich App 526 (1975). Respondent here did not raise his claim that the trial court's instructions shifted the burden of proof on the issue of intent until he filed a delayed application for leave to appeal in 1978. In a response the prosecutor vigorously argued

that Respondent's previous failure to object at trial or on direct appeal precluded review. See *Martinez* v *Harris*, 675 F2d 51 (CA 2, 1982). The Michigan Court of Appeals summarily denied his application and the Michigan Supreme Court subsequently declined review.

The Court of Appeals did not address the argument that *Wainwright* v *Sykes*, 433 US 72 (1977), precluded habeas corpus review in these circumstances. The court instead assumed that the Michigan Supreme Court did not enforce contemporaneous objection rules against failures to object to *Sandstrom* instructions. *Engle* v *Koehler*, sl. op. p. 6, citing *People* v *Wright*, 408 Mich 1, 30, n. 13 (1980).

Wright, however, clearly does not resolve the issue of whether a procedural default precluded review in the case at bar. The *Wright* court itself recognized that their decision to ignor the state's contemporaneous objection rule was a departure from prior practice. 408 Mich at 30, n. 13. As the appeals in this case had concluded some time prior to *Wright*, it is pure speculation to surmise an anticipatory application of this departure.[2] In any event, *Wright* clearly did not address the effect of a failure to raise instructional error on direct appeal, which ommission represents a distinct procedural default. Petitioner submits that a Federal Court on habeas corpus review has a duty to determine whether the state court has applied a procedural default rule even where the state court decisions are unclear in this regard. See *County Court of Ulster* v *Allen*, 442 US 140, 148-154 (1979). Had such an inquiry occurred in this case Petitioner submits that the record would support a conclusion that procedural default was a "substantial basis" for denial of Respondent's

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[2]

It is now clear that Michigan requires preservation of *Sandstrom*-type errors in circumstances like those presented in this case. *People* v *Woods*, 416 Mich 581, 621 (1982).

claim. See *Hockenberry* v *Sowders*, 620 F2d 111, 115 (CA 6, 1980).

In *Engle* v *Isaac*, 456 US 926; 102 S Ct 1558; 71 L Ed 2d 783 (1982), this Court emphasized the importance of federal deference to the state's decision to enforce its procedural rules. Whether a state has enforced such a rule in a particular case represents a question of fact for determination through litigation. Petitioner submits that a presumption of nonapplication violates the spirit if not the letter of *Sykes* and *Engle*.

This Court should grant certiorari in order to precisely define the circumstances which will trigger application of the *Wainwright* v *Sykes* doctrine.

IV.

THE EXTENT TO WHICH SANDSTROM v MONTANA, 442 US 510 (1977), APPLIES TO CASES TRIED PRIOR TO ITS DECISIONAL DATE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS PRODUCED CONFLICT IN THE COURTS OF APPEALS.

The Court of Appeals applied *Sandstrom* v *Montana*, *supra*, retroactively in the case at bar. *Engle* v *Koehler*, sl, op. p. 5, n. 1; see also *Burton* v *Bergman*, 649 F2d 428 (6th Cir, 1981), vacated and remanded on other grounds, 102 S Ct 2026 (1982). The Eighth Circuit has also applied *Sandstrom* retroactively. *Dietz* v *Solem*, 640 F2d 126 (8th Cir, 1981). In *United States* v *Spiegel*, 604 F2d 961 (5th Cir, 1979), *cert den*, 446 US 935 (1980), however, the Fifth Circuit declined to afford full retroactivity to *Sandstrom*-type errors. In *People* v *Woods*, 416 Mich 581 (1982), the Michigan Supreme Court analyzed the retroactivity of *Sandstrom* pursuant to the principles set forth in *Stovall* v *Denno*, 388 US 293 (1967) and *Linkletter* v

Walker, 381 US 618 (1965), and determined that *Sandstrom* should not apply retroactively unless the case was pending on direct appeal when *Sandstrom* was decided and the issue had been properly raised and preserved for review. 416 Mich at 621.

This Court should grant certiorari and address the question of *Sandstrom's* retroactivity.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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UNITED STATES OF AMERICA
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TILDEN N. ENGLE, Petitioner, -vs- THEODORE KOEHLER, Warden, Marquette House of Correction and Branch Prison, Defendant.	Case No. M80-28 CA

OPINION

This is a case in which petitioner challenges the validity of his state court conviction for first degree murder. Petitioner was convicted in 1973 for the December 7, 1972, slaying of Regis Lantzy. Petitioner has exhausted his state remedies, and in his petition to this court for a writ of habeas corpus under 28 U.S.C. § 2254, argues that he was denied due process of law in his state trial. Petitioner contends that certain instructions in the judge's charge to the jury shifted the burden of proof on the element of intent in contravention of the rule set forth in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

Petitioner is in the custody of Respondent at the Marquette State Prison, where he is serving a life sentence as a result of his conviction. Respondent has moved for dismissal of the petition, or in the alternative, for summary judgment. Fed.R. Civ.P. 12(b) (6), 56(b). The case was referred to United States Magistrate Stephen W. Karr. In his Report and Recommenda-

tion, Judge Karr found that petitioner's constitutional rights were not violated in the state proceeding. Specifically, Judge Karr found the instructions given by the trial judge in this case distinguishable from those condemned in *Sandstrom*, and further concluded that even assuming the instructions were erroneous, the error was harmless beyond a reasonable doubt. For the reasons stated below, I concur with Magistrate Karr's findings and, therefore, accept his recommendation that respondent's motion for dismissal be granted.

I.

Petitioner contends he was denied due process of law because the trial court's instructions relieved the prosecution of its burden to prove all the elements of the first degree murder charge. Specifically, petitioner argues that the jury was instructed that it could presume from petitioner's act of shooting the decedent that he intended his victim's death.

The trial court instructed the jurors that petitioner was charged with first degree murder, and that to prove the crime, the state must show beyond a reasonable doubt that the killing was premeditated and with malice. The jurors were also told that they could find the petitioner guilty of second degree murder, which required proof of the same elements as first degree murder, absent premeditation. Further, the jurors were told that they might find petitioner guilty of manslaughter, which the court defined as "the intentional taking of life without either premeditation or malice." The court's instructions left the jurors with the clear message that in order to prove either of these three charges, the state must prove beyond a reasonable doubt "that defendant intended to cause death."

After the court issued the general instructions on homicide, it read to the jurors the following instructions which include those forming the basis of the instant appeal:

"Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to a particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, *malice is implied from any deliberate and cruel act against another person, however sudden.* (Emphasis supplied.)

"We of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but *the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his act. It is somewhat like the old saying that actions speak louder than words.* Therefore in determining whether there was an intent to kill, the jury may properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

"The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or not the wounds were wounds caused by holding the weapon directly against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt."

II.

In *Sandstrom v. Montana*, *supra* at 515, the Court found a violation of due process when the jurors in a murder case were told that "[*t*]*he law presumes* that a person intends the ordinary consequences of his voluntary acts." (Emphasis supplied.) The jurors in that case were not told that they had a choice, or that they might infer from his acts that the defendant intended a particular consequence. They were told only that the law presumes it. *Id.*

Due process was violated because a reasonable juror could have concluded that he was directed to find against the defendant on the element of intent or alternatively, that the defendant was obligated to prove that he lacked the requisite mental state. *Id.* at 524. Either of these results relieves the state of its burden to prove every element of the crime, thus depriving the defendant of due process of law. *Id.*

On the other hand, the Court has stated that:

> "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction."

Chapman v. *California*, 386 U.S. 18, 22 (1967). In *Chapman*, the Court said that a constitutional error is harmless only when the beneficiary of the error (here, the state) can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. In other words, where "there is a reasonable possibility that the evidence complained of might have contributed to the conviction," its admission is not harmless. *Fahy v. Connecticut*, 375 U.S. 85 (1963).

In *Chapman*, petitioners challenged an instruction in which the court told the jurors that they may draw adverse inferences from the failure of the defendants to testify. The Court said that it was "completely impossible for us to say that the state has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions." *Chapman, supra* at 26.

Therefore, this court must answer two questions. First, it must be determined whether a reasonable juror in this case could have interpreted the challenged instruction either to direct him to find against the petitioner on the element of intent, or to place the burden of proving lack of intent on petitioner. If the instruction is found constitutionally infirm, it must then be determined whether the state has proven beyond a reasonable doubt that the challenged instruction did not contribute to the first degree murder verdict.

III.

A jury instruction is not constitutionally deficient if it tells the jury it may draw reasonable inferences from a defendant's behavior. The *Sandstrom* instruction on presumed intent was condemned by the Court because it could have left a reasonable juror with the impression that he had no choice but to presume the defendant intended the consequences of his actions. *Sandstrom, supra* at 515.

Indeed, the Court acknowledged that a reasonable juror could have viewed the instruction as merely permitting the presumption rather than requiring it. However, the Court said:

> "[T]he fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sand-

> strom's jurors actually did proceed upon one or the other of these latter (erroneous) interpretations."

Id. at 519.

Under *Sandstrom*, therefore, an instruction violates due process if any reasonable juror could interpret it as directing a finding that the defendant intended to kill his victim. Applying this test to petitioner's case, I conclude that no reasonable juror could have interpreted the court's instructions as a directive to find against the defendant on the issue of intent. The instructions given at petitioner's trial clearly vested in the jury the authority to decide for themselves whether defendant possessed the requisite criminal intent to justify a homicide conviction. For this reason, I accept the Magistrate's recommendation and grant respondent's motion for summary judgment.

Petitioner presents a well-reasoned and comprehensive attack upon the Magistrate's report. The argument is based largely on the similarities existing between *Sandstrom* and petitioner's case, and the court concedes the two cases are remarkably similar. However, petitioner fails to note a crucial difference between the *Sandstrom* instructions and those given in the instant case. In *Sandstrom*, the Court found that the jurors were not told that they had a choice whether to presume defendant's intent to kill. *Sandstrom*, *supra* at 515. In petitioner's case, on the other hand, no reasonable juror could have concluded from the court's instructions that he had no choice but to presume the requisite mental state from the nature of the act itself. A reading of the instructions in their entirety compels this conclusion.

For a juror to have given the challenged instruction an improper effect, he would necessarily have had to ignore numerous other instructions read by the judge. These instructions expressly placed in issue whether petitioner possessed

the intent to kill and could have left any reasonable juror with only one impression: I must decide whether Mr. Engle intended to kill Mr. Lantyz.[1]

For instance, immediately after giving the challenged instruction that "a person is presumed to intend the natural consequences of his acts . . .," the judge told the jurors that "in determining whether there was an intent to kill" they may consider several factors, including petitioner's use of a deadly weapon, the manner of its use and the number and location of the wounds. The effect of these statements was to tell the jurors that they may infer from the circumstances of the killing that the requisite intent was present, but that a determination of the intent issue was for the jurors to make.

---

[1]

The Sixth Circuit accepts the rule that a challenged instruction must be viewed "not in artificial isolation . . . but . . . in the context of the overall charge." *Burton v. Bergman*, 649 F.2d 428, 431 (6th Cir. 1981) quoting *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). However, in *Sandstrom*, the Court warned against finding harmless an otherwise improper instruction simply because the rest of the charge was constitutionally sound. Where the supposedly curative instructions are not "rhetorically inconsistent with a conclusive or burden-shifting presumption," said the Court, the contaminating effect of the erroneous charge may still be present. *Sandstrom*, *supra* at 519, n. 7. For example, the Court noted that if the presumption were viewed as conclusive, a reasonable juror could believe that although intent must be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt. *Id.*

However, the trial court's instructions on alcohol and insanity, discussed *infra*, are "rhetorically inconsistent" with another instruction that tells the jury they must presume intent to kill from the proof of the act and its natural consequences. This inconsistency and the clear import of numerous instructions placing the intent determination on the shoulders of the jurors virtually eliminate any risk that a reasonable juror could believe he must presume intent to kill from the fact that petitioner shot the victim to death.

The presence or absence of intent to kill was placed in issue once again moments later when the trial court instructed the jury that:

> "In a case of this kind if there is evidence introduced that the defendant was, in fact, intoxicated at the time it is alleged he committed the crime, it should be considered by you for the purpose of determining whether the accused, at the time of the offense, was capable of forming a wilful, deliberate and premeditated purpose to take life and if in this case, although you believe beyond a reasonable doubt that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that at the time he inflicted the fatal injury he was deeply intoxicated, he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, or if you entertain a reasonable doubt as to these things, then such killing would be, at most, murder in the second degree or manslaughter."

At trial, petitioner raised the defense of intoxication. He claimed that he was temporarily insane at the time of the shooting, partially due to the influence of alcohol. With the instruction quoted above, the court clearly told the jurors that when such a defense is raised and supported by some evidence, they must consider the effect of the alcohol on the mental state of the defendant at the time of the alleged criminal act. Petitioner does not challenge these instructions. However, any juror who might have relied on the challenged instruction to find that petitioner intended to kill his victim would have also had to ignore the instruction on alcohol. Conversely, no juror could give the charge on alcohol its due

consideration without presuming that petitioner's mental state during the killing was an issue before the jury.[2]

A similar result obtains upon examination of the temporary insanity instructions given by the court:

> "Now, the defendant has also urged the defense of insanity, and, ladies and gentlemen, it must appear in this case that the defendant is a man of sound mind. . . .
>
> "Ladies and gentlemen, you have heard evidence in this case; you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at that time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident. Did he know what he was

---

[2]

The court went on:

> "What this instruction is telling you is this: if a man becomes voluntarily drunk, he cannot claim that as a defense to a crime unless he has become intoxicated to such degree that he cannot form an intent if the crime for which he is charged is a crime which requires an intent, a specific intent, and the crime of murder in the first degree requires the intent to kill – premeditation – and, therefore, if a person was, in fact, so intoxicated that it was impossible for him to have any intention or any plan to kill somebody, while he might be guilty of murder in the second degree or guilty of manslaughter, he could not be guilty of murder in the first degree for lack of premeditation."

By this instruction the judge strongly suggests, if he does not expressly state that the jury must decide whether petitioner was "so intoxicated that it was impossible for him to have any intention . . ." to kill. By this instruction the judge gave effect to petitioner's intoxication defense, and informed the jurors that they were at liberty to decide, indeed duty bound to decide, whether at the time of the shooting petitioner's mental state and his ability to formulate murderous intent had been affected in any way by intoxication. This instruction is plainly inconsistent with a mandate to find against petitioner on the issue of intent.

doing; whether it was right or wrong? And if he did, then did he know or have the power, the willpower, to resist the impulse occasioned? . . .

"Now, in many criminal cases no question of insanity is ever raised because the Prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts. The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt of insanity, the State has the burden of proving sanity beyond a reasonable doubt.

"The defendant in this case alleges that at the time of the shooting he was suffering from so-called temporary insanity, rendering him not responsible for the alleged shooting.

"What defense attorneys mean by temporary insanity is usually not mental disease at all but merely a strong, emotional agitation, called dissociated [sic] reaction which momentarily overwhelms the consciousness in a sane person. A state of dissociation may arise in which the person carries out a series of acts of which he later has little or no recollection. Where this can be proved it would constitute a defense."

This instruction clearly places before the jury the issue of petitioner's mental state during the commission of the murder. The trial judge, by issuing the challenged instructions, meant merely to tell the jurors they may infer from the act that a given mental state was present. If the judge had meant to impose a conclusive presumption upon the jury as to petitioner's

intent, he would not have given the instructions on alcohol or insanity. For a juror to have given the challenged instructions the effect denounced in *Sandstrom*, that juror would have had to ignore the clear import of the alcohol and insanity instruction.[3]

In short, the effect of these instructions was to vest in the jurors the choice they might have been denied in *Sandstrom*, that is, to determine whether the defendant was capable of forming, and indeed did form, the requisite mental state to render him guilty of homicide. I do not deny that one of petitioner's jurors might have taken the "actions speak louder than words" instruction to mean that the mere act established the charge and that he was being directed to so find. However, any juror who on the basis of these instructions alone concludes he has no choice but to presume intent from the act is not approaching his fact finding duties rationally. And, regrettable though it may be, *Sandstrom* does not protect a defendant from an unreasonable juror.[4]

---

[3]

It is undisputed that petitioner shot Lantzy to death. It is clear, therefore, that petitioner is guilty of homicide unless he was temporarily insane. Petitioner does not challenge the insanity instructions. He does not contend that he was deprived of the benefit of placing the insanity defense before the jury. Rather, he argues that because of the challenged instructions "the jurors could have concluded that the requisite intent was therefore implied and established beyond a reasonable doubt and that they need not go further and consider whether Petitioner actually entertained an intent to kill . . . or whether his intoxication and mental state were such as to preclude or mitigate such an intent." If this were the case, then what concievable purpose or significance could a reasonable juror attach to the alcohol and insanity instructions?

[4]

Protection from unreasonable jurors is afforded by *Jackson v. Virginia*, 443 U.S. 307 (1979), where the Court held that in a federal habeas corpus proceeding, a district court may reverse state factual findings if it can be said that no reasonable trier of fact could have reached such findings. The *Jackson* standard is applicable when a habeas petition

challenges a conviction on the basis of insufficient evidence. For obvious reasons, no such challenge is made here. The court also concedes that it "cannot tell whether this [objectionable] charge was applied by the jury" in finding against the petitioner on the issue of intent *United States v. Williams*, No. 80-5268 (6th Cir. November 30, 1981). However, no reasonable juror would have applied the charge without consideration to the other instructions which clearly left the jury free to find for petitioner on the issue of intent. *See, Burton v. Bergman* note 1, *supra*.

Since I conclude that the judge's instructions in this case did not run afoul of the due process clause, I do not reach the question whether the instructions constituted harmless error.

Respondent's motion for summary judgment is granted and the case is dismissed.

Douglas W. Hillman /s/

Douglas W. Hillman
District Judge

Dated: May 10, 1982.

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TILDEN N. ENGLE, Petitioner, -vs- THEODORE KOEHLER, Warden, Marquette House of Correction and Branch Prison, Defendant.	Case No. M80-28 CA

May 11 2:50 PM '82
CLERK, U.S. DIST. COURT—WESTERN DIST. OF MICH.
BY .....

ORDER

The court has reviewed the Report and Recommendation filed by the United States Magistrate in this action, and has given new consideration and made a de novo determination of those portions to which specific objection has been made, and pursuant to the opinion filed this date,

IT IS ORDERED that the Report and Recommendation of the Magistrate is approved and adopted as the opinion of the court.

IT IS FURTHER ORDERED that the petition for a writ of habeas corpus is hereby dismissed.

Douglas W. Hillman /s/

Douglas W. Hillman
District Judge

Dated: May 10, 1982.

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1470
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TILDEN N. ENGLE, *Petitioner-Appellant*, v. THEODORE KOEHLER, Warden, *Respondent-Appellee*.	On Appeal from the United States District Court for the Western District of Michigan.

Decided and Filed May 9, 1983

Before: CONTIE and KRUPANSKY, Circuit Judges, and CELEBREEZE, Senior Circuit Judge.

CONTIE, Circuit Judge. Tilden Engle appeals from a district court order dismissing a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Engle was convicted in Michigan in July, 1973 of first degree murder and was sentenced to life imprisonment without possibility of parole. The sole issue is whether the trial court's jury instructions on the issues of malice and intent constitute reversible error under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). We reverse the judgment of the district court.

I.

The facts are undisputed. The petitioner, a resident of Detroit, was laid off from his job with Chrysler Corporation on December 4, 1972. Engle suffered from alcoholism and claims that he drank heavily between December 4 and De-

cember 7, the date of the events in question. On that date, Engle returned to the plant shortly after 9:00 p.m. and told Renus Engle, a nephew who also worked for Chrysler, that he was going to kill someone. The nephew testified that the petitioner had tears in his eyes and had a nervous pitch in his voice, a condition in which Renus had never seen his uncle. Renus also stated that although the petitioner had been drinking, he was not drunk.

The defendant then sought Regis Lantzy, who Engle thought was responsible for the layoff. The petitioner went to the office of Donald Ambrose, clerk, and asked for Lantzy. Ambrose told Engle that Lantzy was not present and the defendant stated that he would find him. Ambrose testified that Engle "didn't look quite right — he looked like something was troubling him" and "I had never seen the man before and he looked so strange."

Shortly thereafter, Engle found Lantzy in the plant. In front of several workers, Engle drew a gun and shot him. Lantzy tried to run but the petitioner shot him several more times. Engle briefly stood over the body and then returned to Ambrose's office where he surrendered to a security guard. Ambrose testified that he asked who had been shot and the defendant responded, "Regis Lantzy." When asked why he had killed Lantzy, Engle said, "because he fucked over me." The security guard testified that the petitioner further stated that Lantzy had been shot because "a man can only take so much, he's dead, he ain't going to bother nobody any more" and "I am a man; nobody wants to be walked over by nobody." The guard stated that he could smell alcohol on the petitioner's breath. Two police officers who later arrived on the scene did not detect the odor of alcohol.

On December 8, Engle gave the following written statement to the police:

> I was laid off from Chrysler on Monday, December 4, 1972. Tuesday, Wednesday and Thursday, I drank over a fifth of whiskey each day. Thursday night I took my gun from my bedroom and put it in my — pocket. It was about 9:00 p.m. I knew lunch at Chrysler was from 9:00 to 9:30 p.m. I went to Chrysler's and walked in with some other people who had been out to lunch. I went to Department 9130. I stood in the back and watched for Lantz [sic]. When I saw Lantz I walked towards him and met him. He started to say something like "what the hell are you doing here," or something like that. I didn't let him get it all out. I just pulled the gun out and he said "oh no," and then I shot him twice. He turned and ran and I shot him in the back. He fell and I shot him again. I don't know if I hit him. I saw blood gushing from his mouth and I knew he was dead.
>
> [s/Tilden Engle.]

At trial, Engle's sole defense was temporary insanity because of the effects of alcohol, drugs and dissociative reaction, a temporary mental disorder which is often accompanied by memory loss. Engle testified that he had consumed four librium pills together with large amounts of whiskey on December 7. He further stated that he remembered nothing between the time he was home drinking and the moment when he awoke in jail except for a nightmare-like experience in which he felt fur flying in his face and saw Lantzy on the floor bleeding from the mouth. He did not recall making any statement to the police.

Both sides presented psychiatric testimony. Doctor Ansley

testified for the defense that Engle had suffered a dissociative reaction as a result of several incidents, including five recent deaths in the family, suicide attempts by Engle and another member of the family and the layoff. Petitioner's drinking

had compounded the problem. Dr. Ansley concluded that from a medical standpoint, Engle was not responsible for his actions.

Dr. Edgar testified, however, that although the defendant was an alcoholic, he had not suffered from dissociative reaction. Dr. Edgar opined that Engle was capable of knowing right from wrong at the time of the killing and had not suffered from an irresistible impulse.

The trial judge instructed the jury as follows on the issues of malice and intent:

> Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicket and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, *malice is implied from any deliberate and cruel act against another person,* however sudden.
>
> Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.
>
> We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any

particular time, *but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts.* It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or

not the wounds were wounds caused by holding the weapon directly against the body of the deceased I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case. Whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt. (Emphasis supplied.)

The court had earlier given general instructions on the presumption of innocence and proof beyond a reasonable doubt. Engle now claims that the above quoted instructions on malice and intent constitute reversible error.

II.

Jury instructions in a criminal case must be evaluated not in isolation, but in the context of the overall charge. *Cupp* v. *Naughten*, 414 U.S. 141 (1973). The Supreme Court has

also held that the charge shall not instruct the jury conclusively or rebuttably to presume the presence of an element of a crime; to do so relieves the state's burden to prove guilt beyond a reasonable doubt. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).[1] The test is whether any "reasonable juror could have given the presumption conclusive or persuasion-shifting effect. . . ." Id. at 519. In *Sandstrom*, the court invalidated an instruction which stated that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Since this language is very similar to that used in the present case, we must evaluate the trial court's instruction in light of *Sandstrom*.

The respondent counters that since Engle did not object to the challenged instructions at trial, he must demonstrate cause and actual prejudice rather than merely showing that a rational

juror might have impermissibly relied upon a presumption. *See Fornash* v. *Marshall*, 686 F.2d 1179 (6th Cir. 1982). *Fornash* is distinguishable, however, because the Michigan courts do not enforce a contemporaneous objection rule against failures to object to *Sandstrom* instructions. *People* v. *Wright*, 408 Mich. 1, 30 n.13 (1980). Consequently, the cause and prejudice analysis of *Fornash* is inapplicable to this case.

III.

The district court held that no rational juror could have believed that the instructions in this case mandated a finding that the petitioner intentionally and maliciously killed Lantzy. The court noted that immediately after the trial judge in-

[1] This circuit has applied *Sandstrom* retroactively. *See, e.g., Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir. 1983).

structed the jury that the law provides "a rule of thumb that a person is presumed to intend the natural consequences of his acts," he listed several items for the jury to consider in deciding whether or not the requisite malice and intent had been proven by the state. Requiring the jury to weigh these factors was held to be inconsistent with the presence of a conclusive presumption. The court further indicated that in order for a juror to have given the challenged instructions conclusive effect, the juror would have had to disregard intoxication and insanity instructions which were relevant to the malice and intent issues. The court therefore held that the instructions in question could not have been interpreted as establishing a conclusive presumption.

What the district court did not recognize, however, is that the challenged instructions reasonably could have been interpreted by the jurors as setting forth a presumption which, while not conclusive, shifted to the defendant the burden of proving the absence of malice and intent. As had been indicated, such burden-shifting presumptions are invalid under *Sandstrom*. *See also Phillips* v. *Rose*, 690 F.2d 79, 81 (6th Cir. 1982).[2]

No. 82-1470 *Engle* v. *Koehler, Warden* 7

The trial court instructed the jury that in Michigan, both malice and intent are elements of first degree murder. The court nevertheless stated that "malice is implied from any

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[2]

The respondent cites *Jacks* v. *Duckworth*, 651 F.2d 480, 485 (7th Cir. 1981), *cert. denied*, 454 U.S. 1147 (1982), which upheld an instruction so long as "any presumption of 'a criminal intent from an unlawful act knowingly done' was rebuttable by 'justifying or excusing facts'." As the dissenting judge in that case pointed out, the Seventh Circuit appears to have approved a burden shifting presumption. To the extent that *Jacks* v. *Duckworth* does so, we decline to follow it.

deliberate and cruel act against another person" and that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts." Since a reasonable juror could have thought that these instructions required findings of malice and intent absent proof to the contrary by the defendant, the instructions are indistinguishable from those invalidated in *Sandstrom*.

The state makes several responses. First, the instructions did not include the phrase "the law presumes" as in *Sandstrom*, but only that the law provides a "rule of thumb." In common parlance, however, a "rule of thumb" is a directive that is generally to be followed, albeit with exceptions. Thus a reasonable juror in this case could have inferred that he was to presume intent unless the defendant proved otherwise. An instruction need not track the precise language of the instruction in *Sandstrom* in order to be invalid. The question is one of burden-shifting effect, not of verbal formulation.

Second, the state argues that any error in the instructions was cured by the general instructions on the presumption of innocence and on proof beyond a reasonable doubt. Furthermore, the trial judge purportedly remedied any error by repeating the beyond a reasonable doubt standard at the end of the malice and intent instructions.

We disagree. The instructions on the presumption of innocence and on proof beyond a reasonable doubt are not rhetorically inconsistent with the existence of a burden-shifting presumption because a reasonable juror could have regarded

the presumptions on malice and intent as "a means by which proof beyond a reasonable doubt . . . could be satisfied." *Sandstrom*, 442 U.S. at 518-19 n.7; *Phillips*, 690 F.2d at 81.

Thus, in evaluating circumstances such as the use of a deadly weapon and the number and location of Lantzy's wounds, the jury may have presumed that absent rebuttal by the defendant, these facts constituted proof beyond a reasonable doubt of malice and intent.

In addition, the set of instructions at issue contained other presumptive language. The trial judge stated that a person is presumed to be of sound mind, is presumed to be sane and responsible for his acts and is presumed to have intended the obscuration of mind which accompanies voluntary intoxication. On the question of dissociative reaction, the court instructed that the presence of such a mental defect constitutes a defense "where this can be proven." While these instructions may have been valid,[3] they nevertheless could have reinforced the notion in the mind of a rational juror that the burden-shifting effect of the malice and intent instructions was proper. *Cf. Phillips*, 690 F.2d at 81 (other malice instructions reinforced the effect of the challenged malice instruction). Viewing the jury charge as a whole, we conclude that the challenged instructions are unacceptable under Sandstrom.[4]

---

[3]

Since the validity of these instructions is not before the court, we neither approve nor condemn them.

[4]

The state relies on cases from other circuits such as *Brayboy* v. *Scully*, 695 F.2d 62 (2d Cir. 1982); *Mancuso* v. *Harris*, 677 F.2d 206 (2d Cir. 1982); *Rivera* v. *Coombe*, 683 F.2d 697 (2d Cir. 1982); *Niziolek* v. *Ashe*, 694 F.2d 282 (1st Cir. 1982). The second circuit cases involved intent instructions containing ameliorative or detailed explanatory language. Similar language is not present in the malice and intent instructions at bar. The *Niziolek* intent instruction contains language of permissive inference near the references to presumption, a situation not present here. We express no opinion regarding the correctness of these decisions.

IV.

The final issue for consideration is whether this error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). In the recent case of *Connecticut* v. *Johnson*, 103 S. Ct. 969 (1983), the Court divided equally on the issue of whether instructions held improper under *Sandstrom* could ever be said not to have contributed to the jury's verdict. Four justices favored a traditional harmless error approach while four others would find harmless error only in rare cases (*e.g.*, where the defendant conceded the intent issue). Justice Stevens did not reach the issue. Since the Supreme Court has not supplied clear guidance on this question, we follow the rule in this circuit that *Sandstrom* errors are subject to harmless error analysis. *See, e.g., Company* v. *Anderson*, 698 F.2d 282, 284 (6th Cir 1983).

In *Conway*, this court held that the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea*, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. *See id.* at 285.

This case falls into the latter category. Engle admitted that he killed Lantzy but denied having the requisite *mens rea* to sustain a murder conviction because of the combined effects

of intoxication, the librium pills and mental disease.[5] The evidence concerning these claims was conflicting. For instance, the petitioner and Dr. Ansley testified in a manner supporting the defense of dissociative reaction while Dr. Edgar testified

to the contrary. To some witnesses, Engle appeared calm and coherent near the time of the shooting; to others he appeared to be distraught and possibly under the influence of alcohol. Under these circumstances, we hold that the burden-shifting presumption created by the jury instructions was not harmless.

Accordingly, the judgment is REVERSED and the case is REMANDED to the district court with instructions to grant the writ.

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[5]

This distinguishes the case from both *Krzeminski* v. *Perini*, 614 F.2d 121 (6th Cir.) *cert. denied*, 449 U.S. 866 (1980), in which the defendant admitted the element of "unlawfulness" upon which the erroneous instruction was given and *McGuinn* v. *Crist*, 657 1107 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982), in which the defendant argued alibi rather than lack of intent or malice.

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NO. 83-1

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THEODORE KOEHLER,

Petitioner,

v

TILDEN N. ENGLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 5, 1983
CERTIORARI GRANTED OCTOBER 11, 1983

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NO. 83-1

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NOTATION

The following opinions have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the District Court for the Western District of Michigan, dated May 10, 1982 ..... 1a

Opinion of the Court of Appeals for the Sixth Circuit, dated May 9, 1983 ..... 14a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Feb. 7, 1980 — Petitioner Engle's Petition for Writ of Habeas Corpus filed in the United States District Court for the Western District of Michigan.

June 13, 1980 — Respondent Koehler's Answer to Petition and Motion to Dismiss, or in the Alternative, Motion for Summary Judgment filed.

Nov. 24, 1981 — Magistrate's Report and Recommendation filed, recommending that Respondent's Motion for Summary Judgment be granted and the Petition dismissed.

Dec. 7, 1981 — Petitioner's Objections to Magistrate's Report and Recommendation filed.

May 11, 1982 — Opinion and Order of District Court entered, granting Respondent's Motion for Summary Judgment and dismissing the Petition.

June 8, 1982 — Petitioner's Notice of Appeal filed.

June 28, 1982 — Order of the District Court granting Certificate of Probable Cause.

May 9, 1983 — Opinion of the Court of Appeals for the Sixth Circuit.

May 26, 1983 — Court of Appeals Order staying mandate.

JURY INSTRUCTIONS

July 12, 1973

In the Recorder's Court for
The City of Detroit

People v. Tilden Neil Engle	Docket No. 72 09721

CHARGE OF THE COURT TO THE JURY

THE COURT: Ladies and gentlemen of the jury, we have now reached the stage of the case where the jury must assume its responsibility to determine the facts of this case and the questions of guilt or innocence.

As the Judge in the case I instruct you as to the law and it is your duty to follow the instructions of law as I give them to you; not any statements of law that were made by the attorneys in their arguments or in the voir dire or at any other time, but the instructions of law that I give you with regard to the case at the present time.

You should remember that you have the [655] sole responsibility to determine the facts and the questions of guilt or innocence, based on the evidence that you heard from the witness stand in the case and also the exhibits which were received in evidence in this case.

You have a right to take the exhibits with you into the jury room although it is not a good idea to take both the weapon and the bullets at the same time and for that reason I will withhold them. It is your duty to make as true and perfect a finding of facts as you can without any feelings

of prejudice for or against the Prosecution, or for or against the defendant in the case.

Nothing that the attorneys have said in this case is evidence for the simple reason that they were not sworn as witnesses in the case, and you should not assume from anything that the Court may have said or done during the trial of the case that the Court has an opinion one way or another because where there is a jury in the case the jury has the sole and complete responsibility for determining all the questions of fact and guilt or innocence.

Now, this is a criminal case and the [656] defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt. That presumption of innocence begins at the moment he is charged with the commission of the crime and remains with him through all the proceedings, through the trial and through your deliberations in the jury room unless and until there is sufficient competent evidence to remove that presumption and to establish the defendant's guilt beyond a reasonable doubt.

In accordance with that rule of law, no defendant is compelled to produce any testimony in his own behalf because he does not have to prove his innocence; the State must prove him guilty beyond a reasonable doubt.

In this case the defendant took the witness stand and it is your duty to weigh his testimony just as carefully and as fairly as you do the testimony of any other witness in the case, remembering however that he is the defendant and that he has a direct interest in the outcome of the case.

It is also the function of the jury to determine what weight or credibility you will give to the testimony of each witness, taking into consideration the opportunity that the witness

has had to [657] know the facts about which he or she seeks to testify here upon the stand; taking into consideration the demeanor of the witness upon the stand; the reasonableness of the story that is told; whether the story is conflicting with other testimony that the same witness has given or other testimony in the case that you believe to be true, and whether it is corroborated by other testimony that you believe to be true.

These are some of the tests that will occur to you in weighing the testimony in the case.

I now come to the instruction on reasonable doubt and, as I said before, before you can convict the defendant you must be satisfied as to his guilt beyond a reasonable doubt, and that test must be applied to each of the charges that are involved in this case and as to each of the elements of the charges that presented to you for your deliberation.

A reasonable doubt means a fair doubt; a doubt that is based on reason and common sense; not a foolish doubt, not a vain, captious or imaginary doubt; not a doubt which is based — which is conjured up by something outside the testimony. In other words, your doubts in this case should be doubts which relate [658] in some fashion to the testimony in the case. It is such a doubt that after a careful review of all the evidence you cannot say that you have an abiding conviction to a moral certainty of the defendant's guilt. If you have that kind of doubt it is your solemn duty to resolve it in favor of the defendant and to acquit him. If you haven't such a doubt it is, of course, equally your duty to find the defendant guilty.

Now, in this case there has been some evidence offered of statements by the defendant after his arrest and while he was awaiting trial and I charge you in relation thereto

that such statements are to be received with great caution for, besides the danger of misapprehension of the witness or the misuse of words, failure of the party who expressed his own meaning, the infirmity of memory and the danger of the witness relating the statement, placing the wrong construction on, or obtaining an important conclusion, from the word of a defendant, it should be recollected that the mind of the prisoner himself is often oppressed by the calamity of his situation and he is often influenced by motives of fear and [659] hope to make statements.

Now, the information in this case — and the information is the paper which describes the charge against the defendant and is not to be considered as evidence in any way, the information charges that on December 7th, 1972, at 12700 East Jefferson Avenue, in the City of Detroit, the defendant, Tilden Neil Engle, seated at the counsel table, did feloniously, deliberately, wilfully and with malice aforethought, and with premeditation, did kill and murder one Regis Lantzy, contrary to the statute which is Section 750.316, Compiled Laws of 1948.

The first thing you will notice about this charge is that it states that the offense, if one was committed, occurred in the City of Detroit, and that it occurred on December 7th, 1972, and there was evidence in this case that if a crime was committed as charged in the information, it occurred at the Chrysler East Jefferson Plant, on December 7th, 1972, and I instruct you that that address is an address within the City of Detroit. It is necessary for you to make a finding on this fact because this is a Court of limited jurisdiction, limited to trying cases [660] which occurred or occur within the City of Detroit. As I say, there is evidence that the location was within the City of Detroit.

Now, in addition, the information charges that the crime was murder in the first degree; but the information is also broad enough to include two other offenses and I will define not only murder in the first degree but also the two included offenses of murder in the second degree and manslaughter, in this case.

It is the People's theory of the case that on December 7th, 1972, Tilden Neil Engle, shot and killed Regis Lantzy. On that date — you understand that what I am reading now is the People's contention as to what happened on that particular date and immediately afterwards I am going to read the defendant's contention as to what happened and what the case is about. You understand that — and regardless of anything that is said in this paper that defines the People's theory of the case, it is the jury that has the duty of determining what the facts, true facts, are in the case. You understand that?

It is the People's theory of the case [661] that on December 7th, 1972, Tilden Neil Engle, shot and killed Regis Lantzy; on that date, Mr. Engle, who blamed Regis Lantzy for the loss of his job, plotted and conceived a plan by which he would kill Regis Lantzy. He went to the Chrysler Plant on East Jefferson Avenue in Detroit about 9 to 9:30 p.m., knowing that he could enter the plant with the crowd of workers returning from their lunch hour and not be challenged or asked for an employment badge. Once inside the plant, Mr. Engle saw his cousin, Renus Engle, and told him that he was going to kill a guy. Mr. Engle went to Department 9130 and asked specifically for Regis Lantzy. The Clerk, Mr. Ambrose, could not tell Mr. Engle where Mr. Lantzy was; Mr. Engle then stated to the Clerk, "Well, I'll find him." Mr. Engle then approached Regis Lantzy; upon approaching him and having some conversation with Regis Lantzy, he produced a .38 caliber revolver and fired it twice, striking Mr.

Lantzy in the stomach and forearm. Mr. Lantzy turned and ran; Mr. Engle fired again. Mr. Lantzy fell at this point, got up and started to run again. Mr. Engle then extended his arm and took careful aim and fired a fourth time. Mr. Engle [662] walked to Mr. Lantzy's body and, observing him bleeding profusely from the mouth, and Mr. Engle knew he was dead as he had planned. Mr. Engle turned himself in to the office in Department 9130. He was conveyed to the security office by security guard, Samuel Mays. In that office he gave a statement to Patrolman Richard Ren, a statement which exhibits a clearness of mind and very plainly his decision to kill Regis Lantzy, since he stated to Patrolman Ren, that if he had wanted to kill other people he would have because he had more than enough ammunition, but he only wanted to kill Regis Lantzy. The next afternoon at 2:00 p.m., Samuel Nold interviewed Tilden Neil Engle. In this interview, Mr. Engle again related the events of the crime, his plan to kill Regis Lantzy and the manner in which he carried his plan out. All of this theory points to the fact that at the time of the commission of his crime, Tilden Neil Engle knew right from wrong and was not suffering from an irresistible impulse.

Now, that is the People's theory of the case.

I will now read to you the defendant's [663] theory of the case.

From early adolescence, Tilden Engle has been forced to assume the responsibility for the care of his parents. As he reached adulthood he continued this responsibility and assumed a further obligation of a wife and two children. He suffered from a severe mental disease of alcoholism, which was an escape mechanism. Just prior to the incident at Chrysler his ego suffered from five severe shocks; namely, the death of so many people close to him. Further stress factors were a number of suicide attempts in his immediate

family, by his wife and by himself. Regis Lantzy by his action of laying off this man, who had always performed well for him, was the trigger. It was the final threat to his life, family and manhood. His ego reacted in the only manner possible to prevent a total breakdown. He destroyed that which Tilden Engle believed threatened the well being of his family.

Now, those two documents that I have just read are respectively the contentions of the People and the Defendant, with regard to this particular case.

[664] Now, the information in this case, as I have said, charges not only murder in the first degree but also the two included offenses within the charge of murder which are presented to the jury for their determination; specifically, murder in the second degree, and manslaughter.

The statute which describes murder in the first degree is Section 750.316, Compiled Laws of 1948, and reads as follows:

> "All murder which shall be perpetrated by means of poison or lying in wait, or any kind of wilfull, deliberate and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary." —

I'm sorry, the section has been amended and contains a supplement —

> "— all murder which shall be perpetrated by means of poison or lying in wait, or any other kind of wilfull, deliberate and premeditated killing or which shall be committed in the [665] "perpetration or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree and shall be punished as therein provided."

Now, the next section which is Section 750.317, Compiled Laws of 1948, defines murder in the second degree as follows:

> "All other kinds of murder shall be murder of the second degree."

Now, when — now, I have read you the statute defining murder in the first degree, and it should be noted that there is no charge that the death in this case occurred from poison or in the attempt to perpetrate arson, rape, robbery or any of the specified criminal offenses, but it is the contention of the People that the crime in this case is murder in the first degree because it is the — the murder was wilfull, deliberate and premeditated.

Now, the statute does not contain a specific definition of the crime of murder and we are left to our common law definition of murder and [666] the Court will instruct you with relation thereto:

In similar fashion, Section 750.321, Compiled Laws of 1948, provides a punishment for the crime of manslaughter but, again in that section, there is no definition of what constitutes the crime of manslaughter and the Court will instruct you as to the legal definition of the crime of manslaughter, which is the third offense that must be considered in this case.

A homicide is the intentional taking of a human life. In order to sustain any homicide verdict the Prosecution must prove beyond a reasonable doubt each of the following elements:

> First, that the deceased was a human being who once was living;
>
> Second, that he or she is now dead;

Third, that the defendant caused the death;

Fourth, that the defendant intended to cause the death;

Fifth, that the defendant did not act in self defense; and

Sixth, that the defendant was legally [667] responsible for his acts.

Now, ordinarily, the last question, the question of legal responsibility, does not arise in the homicide case because we have the presumption that a person is of sound mind and, in most cases, the People rely on that presumption and it is not questioned, but, in this case, the defendant alleges that he was not legally responsible for his actions at the time of the alleged offense by reason of temporary insanity and irresistible impulse, or a — or by a degree of intoxication amounting to insanity.

Now when you are considering your verdict in this case if you have a reasonable doubt as to any one of the six elements that I have stated to you just now it would be your duty to return a verdict of not guilty and you would not need to deliberate further in the case. On the other hand, if you find that the Prosecution has proved each of these elements beyond a reasonable doubt, you must then determine whether the killing was first degree murder, second degree murder or manslaughter. To sustain a first degree murder conviction, the Prosecution must establish beyond a reasonable doubt that the killing [668] was done, One, with premeditation and, second, with malice.

To sustain a second degree murder conviction, the Prosecution must prove beyond a reasonable doubt that the killing was done with malice but the element of premeditation is not present in second degree murder.

Manslaughter, on the other hand, is the intentional taking of life without either premeditation or malice.

Murder in the first degree, or in either first degree or second degree, requires a showing of malice but murder in the first degree also requires a showing of premeditation. In other words, whether a murder is first or second hinges on one element: premeditation. To convict the respondent of murder in the first degree it must appear that the killing was wilfull and premeditated. It is not necessary that any definite period of time should have elapsed between the forming of such intention and the striking of the blow which killed the deceased, provided the blow was premeditated and that the defendant acted wilfully.

[669] Now, it is the contention of the People that the defendant's premeditation of the killing was evidenced by the fact that he chose a time to go into the plant when he could get in without a badge by going through with the men who had gone out to lunch and who were returning and, that, further the defendant's premeditation was evidence by the defendant's statement to a relative that he was there to kill a man.

Now, these are elements of the crime of murder in the first degree and before the jury could find premeditation in the case the jury would have to find beyond a reasonable doubt that the defendant went there with premeditation or that he had thought out a plan to kill the deceased in this case and that the killing was intended.

On the other hand, if the killing was done under a sudden impulse without premeditation or a previously formed intention, the offense would be murder in the second degree; if the offense was done with malice the offense would be murder in the second degree, and manslaughter hinges on whether or not there was malice.

If the killing was done with malice [670] it would be one of the degrees of murder, according to whether or not there was premeditation. If there was no malice the crime, at most, would be manslaughter.

Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, malice is implied from any deliberate and cruel act against another person, however sudden.

Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.

We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is [671] presumed to Intend the natural consequences of his acts. It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or not the wounds were wounds caused by holding the weapon directly

against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt.

Now, the other included offense in the case is the crime of manslaughter, and manslaughter is defined as the unlawful killing of another person [672] without malice, expressed or implied.

The offense is one which is committed without malice or premeditation, the result of temporary excitement by which the control of reason is disturbed, rather than from any wickedness of heart or cruelty or recklessness of disposition. The general rule is that if for any person — or for any reason the defendant was at the time of the act disturbed or obscured by passion to an extent which might render ordinary men of fair, average disposition liable to act rashly or without due deliberation or reflection, and from passion rather than from judgment, the crime would be manslaughter.

Now, one of the elements of the crime that the People must prove in this case is that there was freedom from self-defense. Now, in this particular case the evidence does not seem to indicate self-defense and there has not been an argument that there was self-defense in this case but if self-defense is a situation where a person takes the life of another person honestly believing that his own life was in danger, or that he was in imminent danger of receiving serious bodily harm or injury at the hands of the [673] deceased and that he used no more force than was necessary to protect himself under the circumstances.

Now, the defendant in this case has said that he has no remembrance of the alleged crime and that he must have been suffering from temporary insanity which has been described as dissociated reaction, or that he was drinking so much on that day that he has absolutely no recollection of what he did or what occurred on that particular day, so that he did not know what he was doing and cannot be held legally responsible for the shooting of Regis Lantzy, the deceased.

Now, the jury heard the testimony with regard to the use of liquor by the defendant and its effect on the defendant and I will now read you an instruction with regard to the defense of intoxication in a case where the defendant is charged with murder in the first degree:

I instruct you, Members of the Jury, in a case of an offense such as the one charged, committed during a period of intoxication, the law presumes the defendant to have intended the disturbance or obscuration of his faculties which followed his [674] voluntary intoxication. He must be held to have purposely blinded his moral perception and set his will free from control of reason and he should, therefore, be held responsible, as well, for the vicious excesses of the will thus set free as for the acts done by its prompting. In other words, it is well settled law in this state that voluntary drunkenness is not a defense to crime. A man who puts himself in a position to have no control over his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited and when real is so often resorted to as a means of nerving a person up to the commission of some deliberate act, and withal, is so inexcusable in itself, that the law has never recognized it to be an excuse for crime. But, in this connection, I must further instruct you, Members of the Jury, that voluntary intoxication, though being no excuse for the commission of a crime, and

will not relieve a person committing a crime from the penalty of the law, still, in a case of this kind if there is evidence introduced that the defendant was, in fact, intoxicated at the [675] time it is alleged he committed the crime, it should be considered by you for the purpose of determining whether the accused, at the time of the alleged offense, was capable of forming a wilfull, deliberate and premeditated purpose to take life and if in this case, although you believe from the evidence beyond a reasonable doubt that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that at the time he inflicted the fatal injury he was deeply intoxicated, he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, or if you entertain a reasonable doubt as to these things, then such killing would be, at most, murder in the second degree or manslaughter.

What this instruction is telling you is this: if a man becomes voluntarily drunk, he cannot claim that as a defense to a crime unless he has become intoxicated to such a degree that he cannot form an intent if the crime for which he is charged is a crime which requires an intent, a specific intent, and the crime of murder in the first degree requires [676] the intent to kill — the premeditation — and, therefore, if a person was, in fact, so intoxicated that it was impossible for him to have any intention or any plan to kill somebody, while he might be guilty of murder in the second degree or guilty of manslaughter, he could not be guilty of murder in the first degree for lack of premeditation.

Now, the defendant has also urged the defense of insanity, and, ladies and gentlemen of the jury, it must appear in this case that the defendant is a man of sound mind. By sound mind is not meant a mind which is the equal of any mind — I think I better take — stop and take a drink of water —

(Court pausing)

— by sound mind is not meant a mind which is the equal of any mind possessed by any mortal in the world. We all know there is a difference in the minds of our acquaintances; some men are very bright; others are very dull but they are held accountable. Perhaps it would be enough to say and to leave it right there that if by reason of disease the defendant was not capable of knowing he was doing wrong in the particular act, or if he had not the power to resist [677] the impulse to do the act by reason or disease or insanity, that would be an unsound mind, but it must be an unsoundness which affected the act in question and not one which did not affect it.

Ladies and gentlemen you have heard evidence in this case, you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at the time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident. Did he know what he was doing: whether it was right or wrong? And if he did, then did he know or did he have the power, the willpower, to resist the impulse occasioned? You should not draw the inference because a man acts frantically mad and angry—very angry—if he does not resist the impulse, that that is unsoundness of mind. This unsoundness must be the result of a disease and not the result of his having allowed his passions to run until they have become uncontrollable, so the law requires a man that he will curb his passions and restrain himself, and if he does not do so, holds him [678] accountable unless it is by reason of disease which renders him unable to do so.

A defendant is irresponsible if by reason of his disease—and I stress the fact that it must be from disease—he is not

capable of knowing he was doing wrong in the particular act or if he had not the power to resist the impulse to do the act by reason of insanity.

Irresistible impulse is a defense under the above tests but it must be the result of disease and not the result of a defendant having allowed his passions to rise until they become uncontrollable.

Now, in many criminal cases no question of insanity is ever raised because the Prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts. The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt [679] of insanity, the State has the burden of proving sanity beyond a reasonable doubt.

The defendant in this case alleges that at the time of the shooting he was suffering from so-called temporary insanity, rendering him not responsible for the alleged shooting.

What defense attorneys mean by temporary insanity is usually not mental disease at all but merely a strong, emotional agitation, called dissociated reaction which momentarily overwhelms the consciousness in a sane person. A state of dissociation may arise in which the person carries out a series of acts of which he later has little or no recollection. Where this can be proved it would constitute a defense.

Now, ladies and gentlemen of the jury, there were experts brought into testify on both sides. I instruct you that under proper conditions, both experts and lay witnesses, who are not

experts, may express opinions as to the sanity or insanity of the defendant. The jury is the sole judge of the values that are to be given to these opinions. You may accept such offered opinions or you may reject [680] them completely.

At this time I am going to excuse the jury for a short time.

The jury may return to the jury room.

(Jury returned to the jury room at 10:31 a.m.)

(In the absence of the jury.)

THE COURT: I have prepared a set of possible verdicts in this case—I will submit to—I only have one copy—I would also like to know if there are any objections—corrections or additions to the charge that you would like to discuss at this time?

MR. DOETSCH: People are satisfied with the instructions as given, your Honor and we have no objection to the jury being given a copy of the piece of paper entitled, 'possible verdicts.'

THE COURT: Will you examine them, Mr. Robiner?

MR. ROBINER: Your Honor, I think earlier in chambers we—the Court, along with Mr. McGuire, I had raised the qestion of—that it is necessary for the jury to understand that not guilty by reason [681] of insanity does not release the man from any responsibility—

THE COURT: I am going to instruct them as to the possible verdicts and I will do that at the same time.

Anything further?

MR. DOETSCH: I have nothing.

MR. ROBINER: I can't think of anything more.

THE COURT: You may recall the jury.

(Jury recalled and is present at 10:34 a.m.)

THE COURT: Ladies and gentlemen of the jury in this case there are five possible verdicts:

The first verdict is guilty as charged, that is, guilty of murder in the first degree, and that would be—I have explained it—I have made a sheet describing each of the possible verdicts and the requirements for that verdict.

The verdict of guilty of murder in the first degree would indicate that the defendant was sane and killed the deceased with malice and [682] premeditation;

The second possible verdict is guilty of murder in the second degree, that verdict would indicate that the defendant was sane and killed the deceased with malice but without premeditation;

The third possible verdict is guilty of manslaughter; that would indicate that the defendant was sane and killed the deceased without malice and without premeditation;

The fourth possible verdict is not guilty by reason of insanity. That verdict indicates that the defendant did all of the acts charged but was not guilty by reason of insanity;

And the fifth possible verdict is not guilty, a general verdict, that the defendant did not do the acts charged.

Now, I will explain the fourth possible verdict further—the not guilty by reason of insanity verdict; The verdict not guilty by reason of insanity is a special verdict and it means that—it does not mean that the defendant will be discharged. It means that he will be committed to the Department of Mental Health until recovered.

[683] At this time I am going to ask Mr. Robiner to come forward and draw two capsules from the box of capsules to reduce the jury to the constitutional number.

(Whereupon the jury was reduced by 12 jurors by excuse of two jurors selected by capsule by defense counsel.)

(Gladora Coles and Ruth Ann Bates were excused jurors.)

THE COURT: Will you swear the officers to tend the jury?

(Jury Officers sworn by Court Clerk to tend the jury.)

THE COURT: Ladies and Gentlemen of the jury, you will be given a copy of the possible verdicts as soon as we have had them reproduced.

You may retire and consider your verdict.

(Jury excused to begin deliberations at 10:33 a.m.)

IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

No. 57655

EXCERPT FROM DELAYED APPLICATION FOR LEAVE TO APPEAL

PEOPLE
v
TILDEN NEIL ENGLE

• • •

d. Contrary to state and federal law, the judge gave a presumptive, erroneous definition of malice. He said malice includes every bad motive and is implied from every cruel act. Reversible error. *Nye* v *People*, 35 Mich 16, 18 (1862); *People* v *Goodard*, 82 Mich App 424 (1978). He said, "Actions speak louder than words" and "a person is presumed to intend the natural consequences of his acts". Reversible error, even absent defense counsel's objection. *United States* v *Robinson*, 545 F2d 301 (CA 2, 1976); *United States* v *Chiantese*, 546 F2d 135 (CA 5, 1977).

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IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

No. 57655

EXCERPT FROM BRIEF IN SUPPORT OF DELAYED APPLICATION FOR LEAVE TO APPEAL

PEOPLE
v
TILDEN NEIL ENGLE

• • •

IV. BY INSTRUCTING THAT MALICE INCLUDES EVERY UNLAWFUL AND UNJUSTIFIABLE MOTIVE; THAT MALICE IS IMPLIED FROM ANY DELIBERATE AND CRUEL ACT AGAINST ANOTHER; THAT THE LAW PRESUMES A PERSON TO INTEND THE NATURAL CONSEQUENCES OF HIS ACT; AND THAT "ACTIONS SPEAK LOUDER THAN WORDS", THE JUDGE TOOK THE ISSUE OF MALICE (INTENT) AWAY FROM THE JURY.

This Court has promised to review jury instructions in their entirety. E.g., *People* v *Ely*, 35 Mich App 390, 392 (1971). The whole malice instruction is set out in the Statement of Facts. Three portions *especially* objected to are discussed below.

A. MALICE INCLUDES EVERY BAD MOTIVE AND IS IMPLIED FROM EVERY CRUEL ACT.

The definition of malice as including every bad or unlawful motive, and as implied from every cruel act, is so overbroad

it is meaningless. Under this definition every tortfeasor is a murderer and manslaughter does not exist. This part of the instruction alone was declared reversible error in *Nye* v *People*, 35 Mich 16, 18 (1862):

> "The definition of malice given in this case would remove manslaughter from the catalogue of homicides. *Every crime must be attended with an unlawful and unjustifiable motive.* Malice includes those which are more wicked, but it does not include them all. *There are many unlawful and unjustifiable motives which have never been classed as malicious.*" (Emphasis added).

Recently this Court re-condemned this malice instruction in a case where evidence of malice was strong and defense counsel had not objected. *People* v *Goodard*, ... Mich App .... (#21009, released April 4, 1978).

From whatever ancient source these definitions were dredged up, they are not what malice means in Michigan:

> "Malice aforethought is the intention to kill actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense to manslaughter." *People* v *Morrin*, 31 Mich App 301, 310-311 (1971) (footnote omitted).

In *Morrin* Judge (now Justice) Levin warned that jurors would be left to their own confusion by arcane definitions of malice:

> "Consider . . . that the term 'malice aforethought' *does not mean malice as used in ordinary speech*, and forethought is not required, and it becomes clear that *it is well-nigh impossible to communicate to jurors in the arcane jargon of malice aforethought the mental state required.* No

> doubt many jurors are confused, and many, in error but understandably, make up their own working definition of what malice aforethought 'must' mean." At 319-320 (Emphasis added).

The difficult becomes impossible where, as in this case, the instructions are not merely arcane but erroneous. The jurors did not even have to find malice for themselves. The court told them malice is implied from any deliberate and cruel act against another. Since shooting someone is a cruel act, the question was closed. The jury did not have to worry about the intent with which the act was done. Given the act, the law supplied malice.

The law never implies malice. Malice is never more than an inference the jury may, not must, draw. This has been clear in Michigan for over a century. *Maher* v *People*, 10 Mich 212, 217-218 (1862):

> ". . . the question whether [malice] existed or not . . . would seem to be *as clearly a question of fact for the jury, as any other fact in the cause* . . . and that the Court have no right to withdraw the question from the jury by assuming to draw the proper inferences from the whole, or any part of, the facts proved, as presumption of law." (Emphasis added).

See also *People* v *Morrin*, *supra*, and *People* v *Martin*, 392 Mich 553 (1974), affirming *Maher*, and *People* v *Goodard*, supra.

Intent to kill is an essential element of every murder. Permitting the jury to presume intent from an isolated fact (here, a cruel act) conflicts with the presumption of innocence which extends to every element of a crime. *Morrissette* v *United States*, 342 US 246, 275; 72 S Ct 246; 96 L Ed 2d 288 (1952);

Mullaney v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975). Defense counsel's failure to object is insignificant. *United States* v *Robinson*, 545 F2d 201, 306 (CA 2, 1976); *People* v *Goodard*, supra. This error cannot be held harmless unless the prosecutor proves beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* But here the error was compounded by two others.

B. "ACTIONS SPEAK LOUDER THAN WORDS".

Several eye witnesses saw Appellant's actions: he shot Regis Lantzy. He never denied it. But many words were spoken in the case about Appellant's state of mind when he acted. These words were Appellant's only defense. The judge effectively told the jury the law considered Appellant's words less important than his actions.

Such a statement has no place in criminal jury instructions, especially in a first-degree murder case where state-of-mind is the vital issue. The judge many (sic) have been merely indulging in a favorite homily. But there is no reason to believe the jury did not accept this as a maxim of law, especially where the rest of the malice instruction was laced with consistent presumptions. See §C.

C. "THE LAW GIVES US A RULE OF THUMB THAT A PERSON IS PRESUMED TO INTEND THE NATURAL CONSEQUENCES OF HIS ACTS."

First-degree murder is a specific intent crime. *People* v *Garcia*, 398 Mich 250 (1976). The prosecutor had the burden of proving specific intent to kill beyond a reasonable doubt. *In Re Winship*, 397 US 358; 25 L Ed 2d 368; 90 S Ct 1068 (1970); *People* v *Jordon*, 51 Mich App 710 (1974); *Mullaney* v *Wilbur*, 421 US 784; 44 L Ed 2d 508; 95 S Ct 1831 (1975). But since the natural consequence of shooting someone at close range is to kill him this instruction relieved the prosecutor of

his duty. The judge said the law *presumed* Appellant intended the natural consequence of his act—Regis Lantzy's death.

A trial court many not instruct that the law raises a presumption of intent from an act. *Morissette* v *United States*, 342 US 246; 96 L Ed 288; 72 S Ct 240 (1952). The rule of *Morissette* was established in Michigan over a century ago:

> "We think the general rule is well settled, to which there are few, if any, exceptions, that when a statute makes an offense to consist of an act combined with a particular intent, then intent is just as necessary to be proved as the act itself, and must be found by the jury, as a matter of fact, before a conviction can be had . . . And in all such cases the *particular intent charged* must be proved to the satisfaction of the jury; *and no intent in law or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter.*" *Roberts* v *People*, 19 Mich 401, 404-415 (1870) (Emphasis added).

Thus, giving the "natural consequences" instruction in connection with a specific intent crime was declared reversible error in *United States* v *Robinson*, 545 F2d 301 (CA 2, 1976). In *Robinson*, the district judge had instructed that:

> "A person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result."

The Court on appeal noted that the use of such an instruction, which *allows* the jury to *infer* that a person *ordinarily* intends the "natural and probable consequences" of acts even

knowingly done, has long been condemned in the Second Circuit as shifting the burden of proof on the issue of intent to the defendant.

In the present case the jury was *required* to *presume* that an actor *always* intends the consequences of his acts, even if done in a sub-standard state of consciousness. The present instruction was much more heavy-handed than the one condemned in *Robinson*, and it was only one of a series of instructional errors.

The "natural and probable consequences" instruction in (sic) known as the *Mann* instruction. Recently another federal circuit court became so exasperated with repeated use of the *Mann* instruction despite repeated condemnation and warnings to trial judges that it emphatically declared the instruction per se reversible error, refusing to be sidetracked by considerations of failure to object, curative instructions, or harmless error:

> "This charge has become known as the *Mann* instruction. Probably no other jury instruction has received so much attention and repeated condemnation in this Circuit. Despite our emphatic disapproval in a series of cases, this serpent rears its ugly head once again. This charge is so infamous that in the standard text on federal jury instruction its use is referred to as an 'invitation to reversible error'.
>
> We accept that invitation as the only way for our message to get through." *United States* v *Chiantese*, 546 F2d 135, 136 (CA 5, 1977) (footnotes omitted).*

*After rehearing en banc, *Chiantese* was modified to order:

"1. No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the

burden to the accused to produce proof of innocence. This includes charges such as:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

or

> The presumption is that a person intends the natural consequences of his acts and the natural presumption would be be (sic) if person consciously, knowingly, or intentionally acted, he intends to violate the law.

or

> The law presumes that every man intends the natural and probable consequences of his own knowing acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent. The intent to injure or defraud can be presumed when the unlawful act which results in loss is proved to have been knowingly committed.

2. The error in giving such a burden-shifting charge will not be absolved because the other phrases defining the proper burden of proof are included in the instructions, no matter how often such corrective phrases are repeated. This court no longer will harmonize inconsistent charges to effect the cure of a charge in violation of paragraph 1.

3. We refuse to classify the giving of a charge in violation of paragraph 1, whether objected to or not, as the type of error which will automatically produce reversal. If, despite our action today, the error should recur, the weighing of its harm to the accused shall remain a judicial matter to be resolved in the context of each case where it occurs. Such weighing, however, shall not include consideration of whether a defective charge has been cured by prior or subsequent statements." *United States* v *Chiantese*, 560 F2d 1244 (CA 5, 1977).

Notice that objection is irrelevant and the only question remaining is that of harmless error.

• • •

In light of *Mullaney* v *Wilbur*, *supra*, where the Supreme Court held that the due process clause requires the prosecution to bear the burden of proof beyond a reasonable doubt on every element of the crime charged, the error inherent in the "natural and probable consequences" charge takes on constitutional dimension. Therefore, held *Robinson*, the defendant's failure to object did not justify a presumption of waiver of his rights under *Mullaney*. Even though the government presented a strong case in *Robinson*, the Court was unable to conclude that the erroneous charge was harmless beyond a reasonable doubt. Robinson's conviction was reversed. Likewise in the present case, defense counsel did not object to the charge. But his failure does not preclude review since the error is of constitutional magnitude, *United States* v *Robinson*, *supra*, and since the error took an essential element of the offense from the jury. *People* v *Murray*, 72 Mich 10, 16 (1888); *People* v *Guillett*, 342 Mich 1 (1955); *People* v *Jordan*, *supra*. Cf. Issue VII

IN THE COURT OF APPEALS
FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee vs TILDEN ENGLE, Defendant-Appellant	No. 78-2485

EXCERPT FROM ANSWER IN OPPOSITION TO DELAYED APPLICATION FOR LEAVE TO APPEAL

• • •

7. Appellee denys that the issue raised by appellant are meritorious. Appellee claims also that the issue raised herein by appellant regarding the correctness of the judges instructions on intoxication was raised by appellant in his original appeal of right and decided by this court in *People* v *Engle*, 61 Mich App 628 (1975). Appellant is foreclosed from raising it again. *People* v *Bergin*, 63 Mich App 526 (1975). Appellee denies that the trial court's instructions were confusing, prejudicial and burden shifting on insanity, intoxication, malice and appellant's credibility.

• • •

IN THE COURT OF APPEALS
FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee vs TILDEN ENGLE, Defendant-Appellant	No. 78-2485

EXCERPT FROM BRIEF IN SUPPORT OF ANSWER IN OPPOSITION TO DELAYED APPLICATION FOR LEAVE TO APPEAL

• • •

ARGUMENT

I.

THE DOCTRINE OF "THE LAW OF THE CASE" LIMITS A CRIMINAL APPEAL FROM A SINGLE CONVICTION TO ONE, IN WHICH ALL POINTS WHICH ARE KNOWN (OR COULD BE KNOWN BY THE EXERCISE OF REASONABLE DILIGENCE) MUST BE PRESENTED, PRECLUDING REPETITIVE APPEALS.

After his conviction in 1973 for first degree murder, defendant appealed as of right to this Court. In *People* v *Engle*, 61 Mich App 628 (1973) the Court affirmed defendant's conviction. In that appeal appellant claimed the trial court erred in its instructions on *intoxication*. The court ruled at 630:

> Defense counsel made no objection to that charge and we are persuaded that it was a correct statement of the law before the decision in *People* v *Crittle*, 390 Mich 367 (1973).

Defendant filed an application for leave to appeal in the Supreme Court. Leave to appeal was denied. He now brings this application for leave to appeal to this Court. Appellee contends that leave to appeal to this Court should be denied since the issues raised by appellant are neither jurisdictional, *People* v *Tubbs*, 64 Mich App 341 (1975) (concurring opinion) nor concern a newly decided question of law with retroactivity implications. Appellee contends further that defendant is precluded by "the law of the case doctrine" from raising by this appeal questions that either were or could have been raised in his original appeal of right. That a defendant is not entitled to numerous piecemeal appeals from a single conviction, was stated by this Court in *People* v *Bergin*, 63 Mich App 526 (1975).

> Inasmuch as defendant could have raised these questions, and did, at the time of his original appeal, he is now precluded by the law of the case doctrine from belatedly raising these questions as a subsequent appeal.
>
> Public policy militates strongly against piecemeal litigation of alleged errors by means of successive and interminable appeals from a single judgment. This policy is embodied in a rule of law similar to the res judicata rule, generally known as the law of the case doctrine. 63 Mich App 529.

In addition to the fact that defendant seeks by this application to raise issues that either where (sic) or could have been raised in his original appeal of right, is the fact that at no time did defendant object at trial to the alleged errors which form the basis of his delayed application for leave. He cites five issues based on allegations of instructional error by the trial judge. Defendant did not object to the instructions before the jury retired to deliberate. GCR 1963, 516.2 states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the ground of his objection.

Failure to object to instructions precludes appellate review unless it affirmatively appears that the claimed errors resulted in a miscarriage of justice. *People* v *Rhinehart*, 70 Mich App 390, 393 (1976); *People* v *Timothy Washington*, 43 Mich App 150 (1972).

• • •

ORDER OF THE COURT OF APPEALS

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 25th day of August in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable

Donald E. Holbrook
Presiding Judge
Robert B. Burns
Daniel F. Walsh
Judges

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, -v- TILDEN ENGLE, Defendant-Appellant.	Docket No. 78-2485 L. C. No. 72-09721

In this cause an application for delayed appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

(Certificate omitted in printing)

Office-Supreme Court, U.S.
FILED
AUG 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THEODORE KOEHLER, Warden,

Petitioner,

-vs-

TILDEN N. ENGLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS CONCLUSION CONSISTENT WITH SANDSTROM v MONTANA, 442 US 510 (1979), THAT THE TRIAL COURT'S INSTRUCTIONS ON REASONABLE DOUBT WERE NOT RHETORICALLY INCONSISTENT WITH BURDEN SHIFTING INSTRUCTIONS ON PRESUMED INTENT AND FINDING WHEN READ AS A WHOLE AS REQUIRED BY CUPP v NAUGHTEN, 414 US 141 (1973), THAT THE REMAINDER OF THE INSTRUCTIONS EXACERBATED THE BURDEN SHIFTING EFFECT PRESENTS ANY IMPORTANT FEDERAL QUESTION?

II. WHETHER THE COURT OF APPEALS COMPREHENSIVE REVIEW OF THE EVIDENCE PRESENTED, APPLICATION OF THE TRADITIONAL CHAPMAN v CALIFORNIA, 386 US 18 (1967), HARMLESS ERROR TEST AND CONCLUSION THAT THE BURDEN SHIFTING INSTRUCIONS ON PRESUMED INTENT WERE NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE CONFLICTING EVIDENCE OF INTENT WAS PRESENTED RAISING A QUESTION OF FACT FOR THE JURY PRESENTS ANY SIGNIFICANT FEDERAL QUESTION?

III. WHETHER THE COURT OF APPEALS CONCLUSION THAT THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), DO NOT APPLY WHERE THE HIGHEST COURT OF THE STATE WHOSE JUDGMENT IS UNDER REVIEW HAS SPECIFICALLY HELD AS A MATTER OF STATE PROCEDURAL LAW THAT NO CONTEMPORANEOUS OBJECTION IS REQUIRED AT TRIAL TO PRESERVE PRESUMED INTENT INSTRUCTIONAL ERRORS PRESENTS ANY IMPORTANT FEDERAL QUESTION?

[Continued]

IV. WHETHER PETITIONER'S ABANDONMENT IN FEDERAL COURT OF ITS SEPARATE PROCEDURAL DEFAULT CLAIM BASED ON RESPONDENT'S FAILURE TO RAISE THE PRESUMED INTENT INSTRUCTIONAL ERROR IN HIS INITIAL APPEAL TO MICHIGAN'S INTERMEDIATE APPELLATE COURT PRECLUDES RESURRECTION OF THAT CLAIM IN THIS COURT?

V. WHETHER MICHIGAN HAS ANY PROCEDURAL DEFAULT RULE BARRING APPELLATE REVIEW OF ISSUES NOT RAISED IN THE INITIAL APPEAL TO THE STATE'S INTERMEDIATE APPELLATE COURT?

VI. WHETHER THE STATE COURTS' FAILURE TO RELY ON ANY PROCEDURAL DEFAULT AND REJECTION OF RESPONDENT'S CONSTITUTIONAL CHALLENGE FOR LACK OF MERIT IN THE GROUNDS PRESENTED RENDERS THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), INAPPLICABLE?

VII. WHETHER PETITIONER'S FAILURE BELOW TO RAISE ANY CLAIM DISPUTING THE RETROACTIVE APPLICATION OF SANDSTROM v MONTANTA, 442 US 510 (1979), PRECLUDES CONSIDERATION OF THAT CLAIM IN THIS COURT?

VIII. WHETHER THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE EXTENT TO WHICH SANDSTROM v MONTANA, 442 US 510 (1979), SHOULD BE RETROACTIVELY APPLIED GIVEN THAT RESPONDENT RAISED HIS CONSTITUTIONAL CHALLENGE TO THE PRESUMED INTENT INSTRUCTIONS IN HIS INITIAL APPEAL TO THE MICHIGAN SUPREME COURT IN 1977 TWO YEARS BEFORE SANDSTROM WAS DECIDED?

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COUNTERSTATEMENT OF THE CASE

The sole question facing Respondent's jury was whether the prosecution had proven beyond a reasonable doubt that he possesed the requisite mens rea when he shot the Deceased to be found guilty of willful, deliberate and premeditated first degree murder.

Respondent testified he drank heavily for the three days preceeding the shooting ano also ingested four librium pills the last day (250-257). The next thing he fully recalled was waking up in jail (258). Of the interim he only recalled "the fact that fur was flying in my face and I saw Lantz [the Deceased] as if in a nightmare on the floor with blood gushing from his mouth" (258). He testified that while he recalled talking to one Detroit police officer after he turned himself in, he did not recall saying many of the things the police claimed he said (261, 308-309).

Dr. Mary Ansley testified for the defense that as a result of mounting stress caused by five recent deaths in Respondent's family, a suicide attempt by his wife and the loss of his job, he suffered a sudden, dissociative reaction mental breakdown at the time of the shooting characterized by impaired perception, judgment and consciousness (353-359). Dr. Ervin Edgar, called by the prosecution on rebuttal, conceded that Respondent suffered from chronic alcoholism and that at the time of the shooting his

heavy drinking might have anaesthetized him to the point that he could not control himself (434-435).

Officer Richard Ren, who spoke to Respondent at the plant shortly after the shooting, testified that Respondent said he came to the plant to talk to the Deceased about getting his job back, had not planned or intended to shoot the Deceased and that while they talked he just pulled out his gun and started firing - - "I don't know . . . I guess I just didn't think" (107, 118-119). Ren testified that during their discussion Respondent at times appeared too calm and emotionless for what had happened and at other times was in tears (94-95, 107).

Renus Engle, Respondent's nephew, testified that when he saw Respondent approximately 30 minutes before the shooting, Respondent "didn't act like his normal self, he had tears running out of his eyes . . . [and] he had a nervous pitch to his voice" (I, 12, 20-22). Never before had Renus seen Respondent acting this way (I, 21-22).

Plant worker Donald Ambrose, who saw Respondent approximately 15 minutes before the shooting, testified that Respondent "didn't look quite right . . . he looked so strange" (38-39, 47).

Plant worker William Richardson, who witnessed the shooting and the events immediately preceeding it, testified that Repondent and the Deceased talked together for five minutes before Respondent pulled out a gun and started firing (21). Richardson testified that his attention was drawn to Respondent

just before the first shots were fired by the "strange" look in Respondent's eyes, a look which he testified he had never seen before during the four years he had worked with Respondent (24-26).

Regarding the question of intent, the trial judge instructed the jury that

> "malice is implied from any deliberate and cruel act against another person, however sudden" (670)

and that

> "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" (670-671).

Regarding the defense of insanity, the judge instructed the jury that

> "[t]he prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts" (678)

and that

> "[w]hen evidence . . . is introduced creating a reasonable doubt of insanity, the State has the burden of proving sanity beyond a reasonable doubt" (678-679).

Regarding the defense of intoxication, the judge instructed the jury that

> "the law presumes the Defendant to have intended the disturbance or obscuration of his faculties which followed his voluntary intoxication . . . and he should, therefore, be held responsible, as well, for the vicious

excesses of the will thus set free" (673-674).

Finally, with regard to Respondent's particular defense of dissociative reaction, the judge instructed the jury that

> "[w]here this [condition] can be proved, it would constitute a defense" (679).

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CONCLUSION CONSISTENT WITH SANDSTROM v MONTANA, 442 US 510 (1979), THAT THE TRIAL COURT'S INSTRUCTIONS ON REASONABLE DOUBT WERE NOT RHETORICALLY INCONSISTENT WITH BURDEN SHIFTING INSTRUCTIONS ON PRESUMED INTENT AND FINDING WHEN READ AS A WHOLE AS REQUIRED BY CUPP v NAUGHTEN, 414 US 141 (1973), THAT THE REMAINDER OF THE INSTRUCTIONS EXACERBATED THE BURDEN SHIFTING EFFECT PRESENTS NO IMPORTANT FEDERAL QUESTION.

The trial court's instruction that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" is not meaningfully distinguishable from the unconstitutional burden shifting instruction condemned in Sandstrom v Montana, 442 US 510 (1979). As explained by Judge Contie for the unanimous panel in this case, a "rule of thumb" in common parlance is a directive that is

generally to be followed unless grounds for departing from the rule are shown. Engle v Koehler, 707 F2d 241, 245 (CA 6, 1983). A reasonable juror hearing this instruction, together with the companion instruction not present in Sandstrom that "malice is implied from any deliberate and cruel act against another person, however sudden", easily could have concluded that the essential element of intent was to be presumed from Respondent's admitted act of shooting the Deceased unless Respondent proved otherwise. The combined effect of these two instructions resulted in a more egregious constitutional violation than that in Sandstrom.

The Court of Appeals correctly concluded that the trial court's instructions on reasonable doubt were not rhetorically inconsistent with and did not cure the burden shifting effect of these two instructions. Engle v Koehler, supra at 245. The reasonable doubt instructions told the jurors they could consider the fact that a deadly weapon was used and the number and location of the Deceased's wounds in determning whether the requisite mens rea had been proven. Given that Respondent admitted repeatedly shooting the Deceased, an act the natural consequences of which is death, the jurors easily could have concluded that the use of a deadly weapon and the nature of the wounds gave rise to a presumption of intent satisfying the prosecution's burden on this element unless Respondent proved otherwise. Compare Sandstrom, supra at 524.

The Court of Appeals also correctly found that when read as a whole as required by Cupp v Naughten, 414 US 141 (1973), the remainder of the instructions given in this case exacerbated the burden shifting effect of the presumed intent instructions. Engle v Koehler, supra at 245. With regard to Respondent's defenses, the judge told the jury that the prosecution was entitled to "a presumption" that he was sane, that "the law presumes" he intended the acts resulting from his intoxication and that if his claim of dissociative reaction "can be proved" it would constitute a defense. A reasonable juror hearing all of these instructions almost certainly would have entered the jury room believing that unless Respondent proved otherwise, the requisite mens rea was to be presumed from his acts.

None of the cases from other circuits cited by Petitoner involved the same combination of instructions found here and are for that reason factually distinguishable.

The Court of Appeals conclusions and findings based on the facts of this particular case present no important federal question.

II. THE COURT OF APPEALS COMPREHENSIVE REVIEW OF THE EVIDENCE PRESENTED, APPLICATION OF THE TRADITIONAL CHAPMAN v CALIFORNIA, 386 US 18 (1967), HARMLESS ERROR TEST AND CONCLUSION THAT THE BURDEN SHIFTING INSTRUCITONS ON PRESUMED INTENT WERE NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE CONFLICTING EVIDENCE OF INTENT WAS PRESENTED RAISING A QUESTION OF FACT FOR THE JURY PRESENTS NO SIGNIFICANT FEDERAL QUESTION.

The Court of Appeals did not, as Petitioner represents, limit its harmless error analysis to whether Respondent had challenged the existence of the requisite mens rea at trial. The Court carefully surveyed the evidence presented by both the prosecution and defense, applied the traditional harmless error test established in Chapman v California, 386 US 18 (1967), and concluded that the unconstitutional presumed intent instructions could not be held harmless beyond a reasonable doubt given the conflicting evidence presented on intent. Engle v Koehler, supra at 242-244, 246.

This careful, case by case approach would pass muster even under the more conservative harmless error analysis advocated by the dissenting plurality opinion in Connecticut v Johnson, ___ US ___; 103 S Ct 969; 74 LEd 2d 823 (1983), and presents no significant federal question.

III. THE COURT OF APPEALS CONCLUSION THAT THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), DO NOT APPLY WHERE THE HIGHEST COURT OF THE STATE WHOSE JUDGMENT IS UNDER REVIEW HAS SPECIFICALLY HELD AS A MATTER OF STATE PROCEDURAL LAW THAT NO CONTEMPORANEOUS OBJECTION IS REQUIRED AT TRIAL TO PRESERVE PRESUMED INTENT INSTRUCTIONAL ERRORS PRESENTS NO IMPORTANT FEDERAL QUESTION.

The Michigan Supreme Court has specifically held as a matter of state procedural law that no contemporaneous objection need be made at trial to preserve Sandstrom type presumed intent instructional errors for appellate review. People v Wright, 408 Mich 1, 30, fn 13 (1980). This holding was applied as recently as April 26, 1983, when the Supreme Court summarily reversed by order because of a presumed intent instructional error despite the absence of an objection at trial. People v Hawley, 112 Mich App 784 (1982), reversed 417 Mich 975 (1983). The Court of Appeals conclusion that the cause and prejudice requirements of Wainwright v Sykes, 433 US 72 (1977), do not apply under such circumstances presents no important federal question.

IV. PETITIONER'S ABANDONMENT IN FEDERAL COURT OF ITS SEPARATE PROCEDURAL DEFAULT CLAIM BASED ON RESPONDENT'S FAILURE TO RAISE THE PRESUMED INTENT INSTRUCTIONAL ERROR IN HIS INITIAL APPEAL TO MICHIGAN'S INTERMEDIATE APPELLATE COURT PRECLUDES RESURRECTION OF THAT CLAIM IN THIS COURT.

While Petitoner argued in the state courts that Respondent's failure to raise the presumed intent instructional error in his initial appeal to Michgan's intermediate appellate court constituted a separate procedural default barring review, that claim was abandoned in federal court. The only procedural default raised by Petitioner in either the District Court or the Court of Appeals was that Respondent had failed to lodge a contemporaneous objection to the instructions at trial. Petitioner even argued in the District Court as part of its argument there that Respondent had failed to exhaust his state remedies that Respondent could still raise the issue in the state courts by way of a delayed application for leave to appeal.1/

Having deliberately chosen not to present this distinct procedural default claim to either the District Court or the Court of Appeals, Petitoner

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1/ Brief of the Attorney General in Support of Motion to Dismiss, p 7. In Anderson v Harless, ___ US ___; 103 S Ct 276; 74 LEd 2d 3 (1982), this Court accepted a similar argument by the Michigan Attorney General.

should be precluded from resurrecting it in this Court. See Stegald v United States, 451 US 204, 208-211 (1981).

V. MICHIGAN HAS NO PROCEDURAL DEFAULT RULE BARRING APPELLATE REVIEW OF ISSUES NOT RAISED IN THE INITIAL APPEAL TO THE STATE'S INTERMEDIATE APPELLATE COURT.

No Michigan decision has ever adopted a procedural default rule barring all subsequent review of any issue not raised in the initial appeal to the state's intermediate appellate court.

In People v Tubbs, 64 Mich App 341 (1975), the lead case cited by Petitioner in support of this proposition, a single judge suggested such a rule in a concurring opinion. Peitioner fails to point out, however, that the majority in that case specifically refused to adopt such a rule, noting that the Michigan Suprme Court had specifically rejected it. Id., 343.

In People v Bergin, 63 Mich App 526 (1975), the second case cited by Petitioner, the Court only held that an issue that had been raised in the initial appeal could not be relitigated in any subsequent appeal Id., 529-530.

In People v Woods, 416 Mich 581 (1982), the last case cited by Petitioner, the Court held that Sandstrom v Montana, 442 US 510 (1979), should be retroactively applied to all cases raising the issue and pending on direct appeal when Sandstrom was

decided. Woods, supra at 621-622. The Court neither discussed nor adopted any initial appeal procedural default rule.

The Michigan Supreme Court's decisions in fact make clear that it will address presumed intent instructional issues on the merits even though not raised in the initial appeal to the state's intermediate appellate court. In People v Gibson, 417 Mich 909 (1983), the Court by order remanded the case to the intermediate appellate court for consideration of such an issue even though it had not been raised in the initial appeal. On remand the Michigan Court of Appeals reversed despite the failure to initially raise the issue.2/

The Michigan Supreme Court's past decisions in other areas confirm that a failure to raise an issue on the initial appeal to the state's intermediate appellate court will not bar review. E.g., People v Hurst, 396 Mich 1, 11 (1976).

Petitioner's factual assertion that Respondent did not raise his presumed intent instructional issue until his second appeal in the Michigan Court of Appeals in 1978 is also incorrect. Respondent first raised the issue in his initial appeal to the Michigan Supreme Court in 1977.3/

2/ People v Gibson, unpublished opinion No. 70122, released July 29, 1983, request for publication pending. See Appendix pp 1a-2a.

3/ See Michigan Supreme Court case number 57655, Defendant-Appellant's Delayed Appli-

(Footnote Continued on Next Page)

VI. THE STATE COURTS' FAILURE TO RELY ON ANY PROCEDURAL DEFAULT AND REJECTION OF RESPONDENT'S CONSTITUTIONAL CHALLENGE FOR LACK OF MERIT IN THE GROUNDS PRESENTED RENDERS THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), INAPPLICABLE.

Following affirmance of his conviction in his initial appeal to the Michigan Court of Appeals, Respondent wrote a pro se letter request for review to the Michigan Supreme Court pursuant to that Court's letter request review procedure. See generally Administrative Order 1975-9, 395 Mich xliii. The request was granted and current counsel was appointed to prepare a delayed application for leave to appeal for Respondent.4/ The Court's order placed no limits on the issues to be raised. The Court thereafter denied Respondent's delayed application raising the presumed intent instructional issue with no indication whatsoever that its denial was premised on any procedural default. People v Engle, 402 Mich 929 (1978).5/

(Footnote Continued From Previous Page)

cation for Leave to Appeal, p 4, ¶5d, and Brief in Support, Issue IV, pp 17-21, filed July 6, 1977.

4/ Unpublished Order, April 26, 1976(3a).

5/ Compare e.g. People v Hessell, 414 Mich 947 (1982), where in an order denying leave the Court specifically relied on a procedural default.

Respondent thereafter filed a delayed application for leave to appeal back in the Michigan Court of Appeals raising the instructional issue to shield against any future argument in federal court that he had failed to exhaust his state remedies. That Court denied the application "for lack of merit in the grounds presented."[6/] The Michigan Supreme Court subsequently denied leave to appeal, again without any indication that its denial was premised on a procedural default. People v Engle, 406 Mich 870 (1979).

Petitioner argued in its brief in the Sixth Circuit that the Michigan Courts had concluded on the merits that the instructions challenged by Respondent did not violate Sandstrom.[7/] In its brief in District Court Petitioner similarly argued that the Michigan Courts had reached and considered the question of harmless error.[8/]

Even assuming Michigan does have an initial appeal procedural default rule, the state courts did not apply it in this case [9/]and rejected Respondent's claim for lack of merit in the grounds presented. The cause and prejudice requirments of Wainwright v

---

6/ Unpublished Order, August 30, 1978 (4a).

7/ Brief of the Attorney General, pp 10-11.

8/ Brief of the Attorney General in Support of Motion to Dismiss, p 15.

9/ The District Court Magistrate so found in his report and recommendations, p 8 fn 3.

Sykes, 433 US 72 (1977), are therefore inapplicable. County Court of Ulster v Allen, 442 US 140 (1979).

VII. PETITIONER'S FAILURE BELOW TO RAISE ANY CLAIM DISPUTING THE RETROACTIVE APPLICATION OF SANDSTROM v MONTANA, 442 US 510 (1979), PRECLUDES CONSIDERATION OF THAT CLAIM IN THIS COURT.

Sandstrom v Montana, 442 US 510 (1979), was decided shortly after the Michigan Supreme Court's denial of Respondent's second application for leave to appeal and was specifically argued by Respondent in support of his habeas pettion in both the District Court and the Court of Appeals. Petitioner never raised any claim in either of those courts that Sandstrom should not be retroactively applied to this case. That claim appears for the first time in Petitioner's petition for a writ of certiorari.

Having deliberately chosen to forego presentation of this claim to the District Court and the Court of Appeals, Petitioner should be precluded from presenting it in this Court. See Steagald v United States, 451 US 204, 208-211 (1981).

VIII. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR DECIDING THE EXTENT TO WHCH SANDSTROM v MONTANA, 442 US 510 (1979), SHOULD BE RETROACTIVELY APPLIED GIVEN THAT RESPONDENT RAISED HIS CONSTITUTIONAL CHALLENGE TO THE PRESUMED INTENT INSTRUCTIONS IN HIS FIRST APPEAL TO THE MICHIGAN SUPREME COURT IN 1977 TWO YEARS BEFORE SANDSTROM WAS DECIDED.

This Court's previous decisions under the Due Process Clause of the Fourteenth Amendment enforcing the prosecution's burden of proving each element of the crime charged beyond a reasonable doubt, In re Winship, 397 US 358 (1970), Mullaney v Wilbur, 421 US 684 (1975), have all been given complete retroactive effect because of the fundamental role this burden and standard of proof play in insuring the integrity of the truth determining process. Ivan V. v City of New York, 407 US 203 (1972), Hankerson v North Carolina, 432 US 233 (1977). The decision in Sandstrom v Montana, 442 US 510 (1979), is of the same class and should likewise be accorded complete retroactive effect.

Even if, however, Sandstrom is only to be given limited retroactive effect, Respondent's raising of his constitutional challenge in his initial appeal to the Michigan Supreme Court in 1977, two years before Sandstrom was decided, should qualify him for limited retroactive application. See United States v Johnson, ___ US ___; 102 S Ct 2579; 72 LEd 2d 202 (1982).

Unless Sandstrom is to be accorded no retroactive effect, this case does not present an appropriate vehicle for deciding this federal question.

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

By: _____

JOHN NUSSBAUMER (P 27422)
Assistant Defender
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Dated: August 18, 1983

APPENDIX

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State Appellate Defender Office

STATE OF MICHIGAN
COURT OF APPEALS

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 70103
On Remand

MYRTLE S. GIBSON, a/k/a
MYRTLE LEE SPEARMAN,

Defendant-Appellant.

_____/

BEFORE: R. B. Burns, P.J., and G. S. Allen and D. E. Holbrook, Jr., JJ

PER CURIAM

This case comes to us by an order of the Supreme Court wherein they state:

"On order of the Court, the delayed application for leave to appeal is considered and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we REMAND this case to the Court of Appeals for consideration of the question of whether it was reversible error for the trial court to instruct the jury that 'it is presumed that a person intends the natural consequences of his acts' in light of People v Wright, 408 Mich 1 (1980) and reconsideration of whether reliance on the defendant's confession to support evidence of premeditation and deliberation so as to warrant a bindover on first-degree murder contravenes this Court's decision in People v Allen, 390 Mich 383 (1973).

"We do not retain jurisdiction."

It should be noted that the defendant did not object to the trial judge's instructions, nor did she raise any such issue on appeal. This is understandable as the trial was conducted August 31, 1979, and People v Wright, 408 Mich 1; 289 NW2d 1 (1980) was decided March 4, 1980.

In Wright the Court found that an instruction, "The law presumes that every man or woman intends the natural, the probable, and the legitimate consequence of his or her own willful and voluntary acts" to be unconstitutional.

In our opinion there is no distinction between the two instructions.

We have carefully reviewed the record of the preliminary examination in this case and other than the defendant's confession

there is no evidence to support premeditation and deliberation so as to warrant a bindover on first-degree murder. People v Allen, 390 Mich 383; 212 NW2d 21 (1973).

The case is reversed and remanded for a new trial on second-degree murder.

/s/ Robert B. Burns
/s/ Glenn S. Allen
/s/ Donald E. Holbrook, Jr.

. A SESSION OF THE S[illegible] COURT OF THE STATE OF [illegible]N. Held at the Supreme Court Room, in the City of Lansing, on the 29th day of April in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice.

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER,
JAMES L. RYAN,
Associate Justices

CR 16-56

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v 37655

TILDEN N. EIGLE,

Defendant-Appellant.

Defendant has requested the appointment of counsel under Administrative Order 1975-9, 395 Mich xxvii. The request, the Court of Appeals record, and the trial court record have been considered. On order of the Court, the request is GRANTED. Defendant shall file with the Recorder's Court an affidavit concerning his present financial status (see guidelines at 387 Mich xxxi). The prosecutor shall be furnished a copy of the financial affidavit and may challenge defendant's asserted indigency within 20 days after receiving the affidavit. The challenge, if brought, shall be resolved at a hearing before the Recorder's Court at which the prosecution, defendant and the State Appellate Defender shall appear personally to aid the court's inquiry. The Recorder's Court, upon a finding of indigency, shall appoint the State Appellate Defender and shall furnish any portion of the record counsel may require.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, the 29th day of April in the year of our Lord one thousand nine hundred and seventy-six.

Clerk.

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 25th day of August in the year of our Lord one thousand nine hundred and seventy-eight

Present the Honorable

Donald E. Holbrook
Presiding Judge
Robert B. Burns
Daniel F. Walsh
Judges

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

TELDEN ENGLE,

Defendant-Appellant.

Docket No. 78-1185
L.C. No. 78-09721

In this cause an application for delayed appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

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AUG

STATE OF MICHIGAN --ss.

I, Ronald L. Dzierzek, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in this court in this cause; that I have compared the same with the original and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 31st day of August in the year of our Lord one thousand nine hundred and seventy-eight.

Clerk

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1

THEODORE KOEHLER, Petitioner,

v

TILDEN N. ENGLE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER SANDSTROM SHOULD RETROACTIVELY APPLY TO JUDGMENTS OF CONVICTION THAT WERE FINAL AS OF ITS DECISIONAL DATE.

II.

WHETHER A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW.

III.

WHETHER THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

No. 83-1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THEODORE KOEHLER, Warden, Petitioner,

v

TILDEN N. ENGLE, Respondent.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

Respondent Engle was convicted of first degree premeditated murder in July, 1973, after a jury trial in the Recorder's Court for the City of Detroit. He was thereafter sentenced to life imprisonment without parole. The Michigan Court of Appeals affirmed Respondent's conviction and the Michigan Supreme Court thereafter denied leave to appeal. *People* v *Engle*, 61 Mich App 628; 233 NW2d 116 (1975), *lv den* (without opinion), 402 Mich 929 (1978). The same courts thereafter denied applications for leave to appeal. *People* v *Engle*, unpublished order dated August 30, 1978 (Docket No. 78-2485); *lv den* (without opinion), 406 Mich 870 (1979). Federal District Judge Douglas W. Hillman of the Western District of Michigan denied Respondent's petition for a writ of habeas corpus in a written opinion dated May 4, 1982. This opinion appears in the appendix to the printed Petition for Writ of Certiorari, Appendix 1a. On Respondent's appeal from Judge Hillman's decision, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case with instructions to grant the writ. *Engle* v *Koehler*, 707 F2d 241 (CA 6, 1983); see also Appendix 14a, Petition for Writ of Certiorari.

JURISDICTION

The opinion of the Court of Appeals (Appendix, Petition for Writ of Certiorari, p. 14a-23a) was filed on May 9, 1983. The Petition for a Writ of Certiorari was timely filed on July 5, 1983, and was granted on October 11, 1983. The jurisdiction of this Court rests upon 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

MCL 750.316; MSA 28.548:

> All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCL 769.26; MSA 28.1096:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any

> criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Michigan General Court Rules 1963, 516.2:

> Objections. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Respondent Engle was found guilty of first degree murder in the December 7, 1972 shooting death of Regis Lantzy at a Detroit automobile plant.

Respondent did not dispute the homicide at trial, but instead presented a defense of temporary insanity.

Trial evidence established that Respondent had been laid off from his assembly line job on December 4, 1972. (245).[*] He received information that his foreman, the decedent, had precipitated this event. (250).

---

[*] Arabic numbers refer to consecutively numbered pages of the trial transcript contained in volumes two through five. A Roman numeral one designates pages appearing in the separately numbered first volumes of the trial transcript.

Respondent returned to the plant at approximately 9:00 p.m. on December 7, 1972. (I, 11-12). He informed his nephew, Renus Engle, that "he was going to kill a guy" (I, 13). Renus Engle described Respondent as crying and with a nervous pitch to his voice (I, 21). He also stated that Respondent was drinking but was not drunk. (I, 28).

At approximately 9:35 p.m. Respondent entered foreman Lantzy's office where he encountered clerk Donald Ambrose. Respondent asked for Lantzy. Ambrose advised Respondent that Lantzy was temporarily absent but was to return shortly. Ambrose offered to find Lantzy. Respondent, however, said "I'll go find him" and then left. (38-41). Ambrose described Respondent as appearing troubled with a strange look in his eyes, but also coherent and polite. (40-42; 56). Ambrose did not detect any odor of alcohol on Respondent's breath. (56).

A short time later, at approximately 9:45 p.m., Cornelius Matthews and William Richardson saw Respondent talking to Lantzy. (I, 54; 20). Respondent then shot Lantzy who began to run. (I, 55; 21-22). Respondent shot again and Lantzy fell. Respondent shot Lantzy twice more, stood over the body and then walked away. (I, 55-56). Another worker, Charles Yates, also witnessed a portion of the attack. (I, 70-71).

Respondent returned to Ambrose's office and stated that he had killed Lantzy because the latter had "fucked over him". (42-43). When plant security officer Samuel Mays arrived at the office, Respondent gave him the gun and admitted shooting Lantzy. (66, 76). Mays detected an odor of alcohol on Respondent's breath but found Respondent coherent. (67).

Detroit police officer Richard Ren arrived next, took custody of Respondent and advised him of his rights. (88-90). Neither Ren nor his partner, Officer Onorio Catenacci, detected

alcohol odor and both observed that Respondent was very calm. (94-95; 127). Respondent described the shooting in detail to Ren. He then stated that he had ceased firing because he believed Lantzy was dead and he did not want to kill anyone else. (106-107). Respondent gave a written version of his admissions to Detroit Police Officer Daniel Nold on the following day. (159-160; 161-162).

Respondent testified that he had no memory of the incident except a nightmarish image of Lantzy with blood gushing from his mouth. (258; 311-312). He claimed he started drinking after his layoff on December 4 and had taken four librium pills on December 7. (257).

Dr. Mary Ansley, a psychiatrist, testified for Respondent and opined that Respondent lacked behavioral control on the night in question due to a mental disorder. (351-359). In rebuttal psychiatrist Ervin Edgar testified that, though Respondent was a chronic alcoholic, he had not experienced a dissociative reaction or an irresistible impulse and knew right from wrong when he killed Lantzy. (415-419, 434).

In closing argument Respondent's counsel advanced an irresistible impulse defense:

> . . . was so possessed, so determined to destroy the symbol that represented destruction of his world, that he had such an irresistible impulse and couldn't control it and had no willpower to stop himself, that once this impulse took over in his own mind it just carried him foward, (sic) and he did what was the only thing in his mind at that point, to destroy this object without regard to who the object was or what their past relationships were or for the consequences and the future, the loss of his family, the destruction of his own life—this didn't mean anything—

> the only thing that meant something was where is the object—I've got to destroy the object—and that's what happened.
>
> (618-619).

Aside from general instructions on the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt and the elements of the offense, the trial court charged the jury as follows on the issues of malice and intent:

> Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, malice is implied from any deliberate and cruel act against another person, however sudden.
>
> Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.
>
> We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts. It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may

properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that--whether or not the wounds were wounds caused by holding the weapon directly against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determing whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt.

13a-14a.

With regard to the defense of insanity the court stated as follows:

Ladies and gentlemen you have heard evidence in this case; you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at the time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident.

• •

The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should

acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt of insanity, the state has the burden of proving sanity beyond a reasonable doubt.

People v *Engle*, at 677-679. 17a-18a

There were no objections to the court's instructions.

SUMMARY OF ARGUMENT

I. Direct appeals from Respondent's 1973 conviction concluded in 1978. Petitioner submits that this Court's 1979 decision in *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979), should not apply retroactively to this case. Though *Sandstrom* relied on prior decisions that addressed the effect of presumptions on the reasonable doubt standard, e.g., *Mullaney* v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), it does not represent either a "clean break" with the past or the simple application of settled precedent to a new factual situation. See *United States* v *Johnson*, 457 US 537; 102 S Ct 2579; 73 L Ed 2d 202 (1982). Retroactivity, therefore, depends on a balance of the purpose-reliance-effect test described in *Stovall* v *Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). In this regard, heavy past reliance on this type of instruction and the interests of finality outweigh the possibility that the ambiguity of *Sandstrom*-type instructions could have substantially impaired the fact facting process in a number of past trials. *Sandstrom*, therefore, should not apply to decisions that were final as of its decisional date.

II. There was no objection at trial or on direct appeal in the Michigan courts to the jury instruction now claimed as violative of *Sandstrom*. The Michigan Supreme Court did not authoritatively address the applicability of the state's con-

temporaneous objection rules to this type of error until 1980. *People* v *Wright*, 408 Mich 1; 289 NW2d 1 (1980). Petitioner submits that these rules were enforced with respect to *Sandstrom* errors prior to 1980, particularly when such claims were first presented on discretionary appeal. Thus, the silence of the appellate courts on this matter in the present case is not conclusive. In fact, the summary denials of discretionary review, in light of the prosecution's reliance on procedural default, support the applicability of *Wainwright* v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977), to the case at bar.

III. Assuming that *Sandstrom* is retroactive and that *Wainwright* v *Sykes*, *supra*, does not preclude collateral review in this case, Respondent submits that the alleged instructional defect, if error at all, was harmless beyond a reasonable doubt. In this regard, Petitioner urges this Court to apply the harmless error test of *Chapman* v *California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). As applied to instructional error, this test requires consideration of the precise language used by the court, the emphasis given to the instruction at trial, the issues actually contested by the defense and the weight of the prosecution's case in this regard. On review of the whole record in this case, there is no reasonable possibility that the alleged instructional error contributed to the conviction.

ARGUMENT

I.

SANDSTROM SHOULD NOT RETROACTIVELY APPLY TO JUDGMENTS OF CONVICTION THAT WERE FINAL AS OF ITS DECISIONAL DATE.

Respondent was convicted in a 1973 trial. Six years later

this Court decided *Sandstrom* v *Montana, supra.* The Sixth Circuit has accorded *Sandstrom* full retroactive effect.[1]

The Constitution neither compels nor prohibits retroactive application of this Court's new constitutional rules. *Linkletter* v *Walker,* 381 US 618, 629; 85 S Ct 1731; 14 L Ed 2d 601 (1965). This determination involves a balance of three criteria: (1) The purpose to be served by the particular new rule, (2) the extent of reliance which had been placed on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new rule. *Stovall* v *Denno, supra,* 388 US at 297.[2] The foremost factor in the retroactivity equation is the purpose of the new rule. *Desist* v *United States,* 394 US 244, 249; 89 S Ct 1030; 22 L Ed 2d 248 (1969). Thus, new rules have received complete retroactive effect where the major purpose of the rule ". . . is to overcome an aspect of the

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[1]

Other circuits which have addressed this issue have reached the same result without extended analysis. *Guthrie* v *Warden, Maryland Penitentiary,* 683 F2d 820, 823, n. 3 (CA 4, 1982). *Ramirez* v *Jones,* 683 F2d 712, 717 (CA 2, 1982) [direct appeal]. *Dietz* v *Solem,* 640 F2d 126, 130 (CA 8, 1981).

[2]

In *United States* v *Johnson, supra,* the court purported to limit the three-factor *Linkletter/Stovall* test to collateral attack situations that do not involve Fourth Amendment issues. Id., at 562. *Mack* v *Oklahoma,* US ; 103 S Ct 201; 74 L Ed 2d 161 (1982), however, may signal extension of the holding in *United States* v *Johnson* to the rule announced in *Carter* v *Kentucky,* 450 US 288; 101 S Ct 1112; 67 L Ed 2d 241 (1981) [failure to give a requested instruction on a defendant's failure to testify violates Fifth Amendment privilege against self-incrimination]. *Mack* involved a direct appeal. In any event, even if applicable to this case, the threshold test employed in *Johnson* would not resolve the retroactivity issue. Though *Sandstrom* relied on prior cases which analyzed presumptions in light of the reasonable doubt standard, it represents neither a clear break with the past nor application of settled precedent to a new factual situation.

criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials . . ." *Ivan V.* v *City of New York*, 407 US 203, 204; 92 S Ct 1951; 32 L Ed 2d 659 (1972); *United States* v *Johnson*, *supra*, 457 US at 562, n. 21.

In *Sandstrom* this Court found particular instructional language violative of due process guarantees because there was a *possibility* that a reasonable juror could have given it conclusive or burden-shifting effect. *Sandstrom* v *Montana*, *supra*, 442 US at 526. The goal of *Sandstrom* was to eliminate even the remote chance of juror misinterpretation. In effect *Sandstrom* represents a prophylactic rule designed to protect the reasonable doubt standard.

This Court has recognized that the extent to which the purposes of a new constitutional rule requires its retroactive application "is necessarily a matter of degree". *Johnson* v *New Jersey*, 384 US 719, 729; 86 S Ct 1772; 16 L Ed 2d 882 (1966). Consequently, retroactivity is only appropriate where the former practice "presents substantial likelihood that the results of a number of those trials were factually incorrect", *Williams* v *United States*, 401 US 646, 655, n. 7; 91 S Ct 1148; 28 L Ed 2d 388 (1971), producing "a clear danger of convicting the innocent". *Tehan* v *United States, ex rel Shott*, 382 US 406, 416; 86 S Ct 459; 15 L Ed 2d 453 (1966).

The possibility of unreliable results due to a *Sandstrom*-type instruction depends on a reasonable juror first perceiving and then impermissibly interpreting a single, often prefatory, phrase in frequently lengthy jury instructions. Even then, as a practical matter, the instruction could have significant negative fact-finding impact only where the issue of intent presented a relatively close question. In other cases, it is at least equally possible that reasonable jurors would arrive at the same result regardless of the ambiguous language of presumption.

Sandstrom thus represents a situation that is fundamentally different in terms of degree from previous instances where new rules implicating the reasonable doubt standard have received complete retroactive effect. See *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970) [retroactivity applied by *Ivan V.* v *City of New York*, *supra*] and *Mullaney* v *Wilbur*, *supra*, [held retroactive in *Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977)]. Both *Winship* and *Mullaney* involved express and unequivocal departures from the requirement that the state prove criminal guilt beyond a reasonable doubt. As stated in *Hankerson* v *North Carolina*, *supra*, 432 US at 242:

> In *Mullaney*, as in *Winship*, the rule was designed to diminish the *probability* that an innocent person would be convicted . . . (Emphasis added)

Accordingly, Petitioner believes that this perceptible difference in degree justifies accordance of substantial weight to the last two factors in the retroactivity equation—reliance and impact on the administration of justice. Consideration of these factors argue strongly for a limitation of retroactive effect.[3] In Michigan, for example, the impact of *Sandstrom* has been summarized by the Supreme Court thusly:

> . . . instructions similar to those used in the immediate case have been approved by the Michigan Supreme Court, *People* v *Medley*, 339 Mich 486; 64 NW2d 708 (1954);

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[3] In *Bassett* v *Smith*, 464 F2d 347 (5th Cir, 1972), *cert den*, 410 US 991 (1973), the court declined to afford full retroactive effect to a decision holding that a state's burden shifting alibi instruction violated due process. The court concluded that the possibility of juror confusion was inadequate to mandate retroactivity despite recognition that the new rule affected the reliability of the fact finding process. Id., at 350-351.

> *People* v *Hodges*, 196 Mich 546; 162 NW 966 (1917); and by the Court of Appeals, *People* v *Nelson*, 35 Mich App 368; 192 NW2d 682 (1971); *People* v *McBride*, 30 Mich App 201; 186 NW2d 70 (1971). Conceivably other cases may be construed as having disapproved of such instructions; however, the existence of unreversed cases approving of such instructions shows that lower courts probably relied on them.
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> • • •
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> Since this Court long approved of such instructions, the number of cases where this instruction was used is surely enormous. (Footnotes omitted).
>
> *People* v *Woods*, 416 Mich 581, 620-621; 331 NW2d 707 (1982).

Collateral review of numerous long final convictions based on the possibility that a misperception of standard instructional language may have affected the factual determination does not serve the ends of justice. As aptly stated by Justice Harlan:

> While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convicitions that were perfectly free from error when made final.
>
> *Mackey* v *United States*, 401 US 667, 691; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (Harlan, J., concurring and dissenting).

Petitioner, therefore, submits that the balance of factors in this case does not favor extension of retroactivity to those cases already final[141] as of *Sandstrom*'s decisional date. Compare *Tehan* v *United States ex rel Shott*, *supra*, [holding the Fifth Amendment rule of *Griffin* v *California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965), nonretroactive to judgments of conviction made final before *Griffin* was decided]; see also *Brown* v *Louisiana*, 447 US 323, 337; 100 S Ct 2214; 65 L Ed 2d 159 (1980) (Powell, J., concurring) [retroactivity of *Burch* v *Louisiana*, 441 US 130; 99 S Ct 1623; 60 L Ed 2d 96 (1979), rule against conviction by nonunanimous six person jury]. This result also comports with ". . . the historic limitations on habeas corpus . . . and the importance of finality in a rational system of justice". *Hankerson*, *supra*, 432 US at 248. (Powell, J., concurring).

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[141]

This Court has long recognized a distinction between the application of a charge in the law that occurs while a case is on direct review as opposed to its affect on a final judgment under collateral attack. *Linkletter* v *Walker*, *supra*, 381 US at 627; *Bradley* v *School Board of Richmond*, 416 US 696, 710-711; 94 S Ct 2006; 40 L Ed 2d 476 (1974). In Petitioner's view, a judgment of conviction is final when direct appeals have been exhausted.

ARGUMENT

II.

ABSENT A DEMONSTRATION THAT MICHIGAN APPELLATE COURTS DECLINED DISCRETIONARY REVIEW OF RESPONDENT'S CONSTITUTIONAL CLAIM BASED ON THE MERITS, A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW.

Respondent did not object at trial to the court's jury instruction on intent. Such inaction bars Michigan appellate consideration absent a demonstration of "manifest injustice". GCR 1963, 516.2;[5] *People* v *Alcada*, 396 Mich 99, 100; 237 NW2d 475 (1976); *People* v *Hawley*, 112 Mich App 784; 317 NW2d 564 (1982).

On direct appeal Respondent challenged the trial court's instruction on intoxication but did not claim that any portion of the charge impermissibly shifted the prosecution's burden of proof. *People* v *Engle*, *supra*, 61 Mich App at 629 (1975). In Michigan the failure to raise, argue or brief an issue on initial appeal precludes subsequent review. *People* v *George*, 375 Mich 262; 134 NW2d 222 (1965); *People* v *Tubbs*, 64 Mich App 341, 347; 236 NW2d 77 (1975).

Respondent finally raised his *Sandstrom* claim on delayed

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[5]

GCR 1963, 516.2 provides:

> .2 Objections. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

appeal.[6] The Michigan appellate courts responded with cryptic refusals to exercise discretionary review. GCR 1963, 803.3; 853.1.

In these circumstances Petitioner argued below that the principles set forth in *Wainwright* v *Sykes*, *supra*, barred federal habeas corpus consideration of Respondent's constitutional claim absent a demonstration of "cause" for the procedural default and actual prejudice as a result of the error. The Sixth Circuit, however, ruled that the cause and prejudice analysis was inapplicable due to a perception that Michigan did not enforce its contemporaneous objection rules with regard to *Sandstrom* errors. *Engle* v *Koehler*, *supra*, at 244.

In *People* v *Wright*, 408 Mich 1; 289 NW2d 1 (1980), the Michigan Supreme Court ignored the absence of contemporaneous objection in order to reach the merits of a *Sandstrom*-type error. The court recognized this action as a departure from the general rule but justified it on the grounds that reliance on defense objection and case-by-case assessment of harm ". . . may inadequately deter *continued* use of the instructions". Id., 408 Mich 30, n. 13 (emphasis added). Properly read, *Wright* represents a 1980 policy decision to create a narrow exception to the state contemporaneous objection rule for certain types of instructional errors. It does not conclusively indicate that a 1978 Michigan appellate court, on

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[6] In the aftermath of *Wainwright*, a number of circuits have applied the cause and prejudice requirement to situations like the instant case where defendants have failed to advance a constitutional claim on direct appeal. *Ford* v *Strickland*, 696 F2d 804 (11th Cir, 1983); *Townsdrow* v *Henderson*, 692 F2d 262 (CA 2, 1982); Contra *Holcomb* v *Murphy*, 701 F2d 1307 (CA 10, 1983). Petitioner agrees that the policies espoused in *Wainwright*, *Engle*, and *United States* v *Frady*, 456 US 152; 102 S Ct 1584; 71 L Ed 2d 816 (1982), support this view. The arguments advanced herein with respect to the absence of trial objection apply equally to the appellate default.

discretionary appeal, would have ignored GCR 1963, 516.2, to address a pre-*Sandstrom* claim that presumed intent language in a jury instruction was violative of due process.

Subsequent to its decision in *Wright*, the Michigan Supreme Court held that *Sandstrom* applied retroactively to those cases where such instructional claims were pending on direct appeal as of *Sandstrom's* decisional date. *People* v *Woods*, *supra*, 416 Mich at 621. *Woods* is consistent with *Wright* to the extent that the absence of a contemporaneous objection at trial in such cases would not preclude review. But neither decision suggests that cases tried prior to *Sandstrom* were immune to then applicable caselaw and procedural rules with regard to such errors.

In light of *Woods*, therefore, the issue is whether there was a controlling state procedural rule at the time of Respondent's default. *Washington* v *Harris*, 650 F2d 447, 451 (CA 2, 1981). It does appear that Michigan appellate courts generally applied GCR 1963, 516.2, to claims of impermissible burden shifting instructions prior to *Wright*. *People* v *Spalding*, 42 Mich App 492, 495-496; 202 NW2d 450 (1972) [alibi instructions]; *People* v *Williams* #2, 45 Mich App 630, 640-641; 207 NW2d 180 (1973) [use of deadly weapon implies malice]; *Hawley*, *supra*, 112 Mich App at 787-788.

Petitioner submits that *Wright* represents a decision to relax Michigan's procedural requirements in order to establish a principle of law for subsequent cases. Similarly, *Woods* stands as a choice to waive contemporaneous objection rules for a specific category of cases. But the policy factors that prompted these decisions do not compel their extension of a matter of constitutional law. In *Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977), this court addressed the argument that retroactive application of *Mullaney* v *Wilber*,

421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), would impose an undue burden on the administration of state judicial systems. Justice White rejected this argument as follows:

> The states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.
> 432 US at 244, n. 8.

This position has been recently reaffirmed in *Engle* v *Isaac*, 456 US 107, 134, n. 43; 102 S Ct 1558; 71 L Ed 2d 783 (1982).

The failure of the Sixth Circuit to recognize *Wright* as a departure from ordinary state procedural rules requires this Court to consider the applicablity of the *Wainwright* analysis to the facts of this case. Only if the state courts *in this case* ignored the procedural default and reached the merits of Respondent's constitutional claim is federal habeas review appropriate. *County Court of Ulster County* v *Allen*, 442 US 140, 152-154; 99 S Ct 2213; 60 L Ed 2d 777 (1979); *Castaneda* v *Partida*, 430 US 482, 485, n. 4; 97 S Ct 1272; 51 L Ed 2d 498 (1977). Where, as here, the reasons for the state court decision are not explicit, a determination of reliance on procedural default requires consideration of all relevant criteria. These considerations include examination of similar cases, review of the history of the case at bar, and analysis of the language employed by the state court opinions. ***Ulster County Court***, *supra*, 442 US 140 at 147-154.

Here the Michigan Court of Appeals declined review due to lack of "merit" in the grounds presented and the Michigan Supreme Court thereafter refused relief "because the Court is not persuaded that the questions presented should be re-

viewed by this Court". Both orders appear to be standard forms for denial of delayed appeals and do not reveal the basis for decision. See *Raper* v *Mintzes*, 706 F2d 161, 164 (CA 6, 1983). In context, therefore, the use of the word "merit" in the Court of Appeals order is indicative of only summary consideration of the merits necessitated by the "manifest injustice" exception to the contemporaneous objection rule embodied in GCR 1963, 516.2. See *Williams* v *Abshire*, 544 F Supp 315, 319 (ED Mich, 1982); see also *Ziegler* v *Callahan*, 659 F2d 254, 271, n. 11 (CA 1, 1981); *Murray* v *Superintendent*, 651 F2d 451, 455, n. 6 (CA 6, 1981). This Court, however, has recognized that the existence of state plain error rules will not preclude the applicability of *Wainwright*, *supra*. *Engle*, *supra*, 456 US 125, n. 27; *United States* v *Frady*, 456 US 152, 177-178; 102 S Ct 1584; 71 L Ed 2d 816 (1982) (Blackmun, J., concurring).

An ambiguous silence alone does not imply that the state tribunals reached the merits of Respondent's claim. The Florida courts were silent on the merits of the petitioner's confession claim in *Wainwright*, *supra*, 433 US 72, 85-86. Similarly, in *Perini* v *Bell*, a companion case to *Engle*, *supra*, this Court enforced Ohio's procedural bar where petitioner had failed to raise his constitutional claim of instructional error at trial or on direct appeal. *Engle* v *Isaac*, 456 US at 124.

It is not necessary to rely solely on silent summary disposition or application of contemporaneous objection rules in other cases to infer reliance on default in the case at bar. Another crucial factor is the prosecutor's primary reliance on trial and appellate default in opposition to Respondent's belated efforts to obtain state review. Though the prosecutor's response also addressed the merits in terms of a manifest injustice inquiry, the posture of the state's response represents a strong indicia for interpretation of the state court action.

The United States Court of Appeals for the Second Circuit persuasively addressed this precise situation in *Martinez* v *Harris*, 675 F2d 51 (CA 2, 1982). In *Martinez*, the state prosecutor met the petitioner's efforts to invoke discretionary appellate review with an alternative argument that raised the absence of objection below and also challenged the merits. The state appellate court affirmed without opinion. In these circumstances, the Second Circuit refused to equate appellate court silence with a decision on the merits. Instead, the panel found that recognition of prudent alternative appellate advocacy by the prosecutor combined with the relative infrequency of a grant of discretionary review by the state courts justified a conclusion that ". . . the appellate division does not exercise its discretion . . . and [decide] a case solely on the merits of a claim unless it says so". Id., 675 F2d 54-55.

To hold otherwise would indulge a presumption that the state courts have waived procedural requirement in every instant of denial of discretionary review absent express and specific reliance thereon as to the particular claims. Interpretation of inevitable ambiguity in this fashion undercuts the state's ability to enforce its procedural rules. For example, a state defendant who has failed to raise a trial objection withholds his or her claim on direct appeal and thus effectively deprives the state court of the option of either rejecting the claim on procedural grounds or addressing the merits. The state defendant next exhausts the claim when the courts subsequently refuse to exercise discretionary review. In the federal habeas forum, the petitioner then asserts that procedural default was not the reason for denial of review. For the reasons of comity, finality and societal cost set forth in *Wainwright* and *Engle* this Court must not countenance such a result.

Given state enforcement of a valid procedural rule in this case, the next step in the *Wainwright* inquiry is whether Respondent can demonstrate "cause" for the default.

Though it appears unlikely that his objection would have been successful in a 1971 Michigan trial court, see *Woods, supra*, futility alone is no excuse. *Engle* v *Isaac*, *supra*, 456 US at 130. Nor can Respondent claim lack of awareness. It is evident that the constitutional foundation for his argument—that due process requires the state to provide all elements of a crime beyond a reasonable doubt—had been recognized prior to his trial. *In re Winship*, *supra;* see also *Morissette* v *United States*, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952). Moreover, federal decisions had found impermissible burden shifting effects in similar instructions. *Mann* v *United States*, 319 F2d 404, 409 (CA 5, 1963); *Stump* v *Bennett*, 398 F2d 111 (CA 8), *cert den*, 393 US 1001 (1968). Respondent thus had the "tools to construct [his] constitutional claim" at the time of his trial. *Engle*, at 133. *Wainwright* forecloses habeas corpus review in these circumstances.

ARGUMENT

III.

EVEN IF VIOLATIVE OF SANDSTROM v MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Introduction

The Sixth Circuit Court of Appeals found that the instruction at issue in this case could have led a reasonable juror to presume intent unless the defendant proved otherwise.

Engle v *Koehler*, 707 F2d 241 (CA 6, 1983). The Court then held that the burden-shifting effect of this instruction was not harmless due principly to the *mens rea* defense asserted at trial. Id., at 246.

In *Connecticut* v *Johnson*, ... US ....; 103 S Ct 969; 74 L Ed 2d 823 (1983), eight justices of this Court divided as to whether a violation of *Sandstrom* could be harmless constitutional error. Four justices opined that an affirmative concession of intent by the defendant was necessary to render a *Sandstrom* error harmless. Id., 74 L Ed 2d at 834. The alternative plurality suggested that conclusive evidence of intent should preclude reversal despite a *Sandstrom* violation. Id., 74 L Ed 2d at 842. The present case revisits this debate.

It is Petitioner's position that a harmless error analysis of *Sandstrom* violations requires a careful assessment of the particular trial context. This review entails a non-mechanistic consideration of the precise language used by the trial court, the emphasis given to the instruction at issue, the issues actually contested by the defense and the weight of the prosecution's case. Undue emphasis on any single factor distorts the reality of the trial. The focus instead must remain on whether the procedural error "contributed to the conviction". *Chapman* v *California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967), quoting *Fahy* v *State of Connecticut*, 375 US 85; 84 S Ct 229; 11 L Ed 2d 171 (1963). Assessment of such error mandates a consideration of the entire record. *United States* v *Hastings*, ... US ....; 103 S Ct 1974; 76 L Ed 2d 96, 106-107, n. 7 (1983).

A. Instructional Language

The mere use of the word "presume" in a jury instruction on intent does not necessarily generate a *Sandstrom* violation. The problem in *Sandstrom* was that the trial court

failed to explain or otherwise qualify the presumption. 61 L Ed 2d 46. Left to speculate, a reasonable juror might have interpreted the instruction as either conclusive on the issue of intent or, minimally, affecting a shift of the burden of persuasion to the defendant.

The *Sandstrom* varient utilized in *Connecticut* v *Johnson* was less ambiguous. The clarification, however, proceeded in the wrong direction. The language used by the court explicitly told the jury that the presumption was conclusive. *Connecticut* v *Johnson, supra*, 74 L Ed 2d at 829. Such direction certainly increases the likelihood of prejudicial impact on the fact finding process.

It is essential, therefore, to focus on the exact language involved in a particular case. *County Court of Ulster County* v *Allen, supra*, 442 US at 157-158, n. 16.

A number of lower courts have recognized that not all *Sandstrom* type instructions embody the same potential for harm. They have carefully examined the precise language for "rhetorically inconsistent", *Sandstrom, supra*, 442 US at n. 7, qualifications or explanations. Some have found that particular words eliminate the constitutional violation as a threshold matter.[7] Others telescoped their linquistic analysis into a harmless error inquiry.[8]

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[7]

Examples of ameliorating phrases include "when not rebutted by the circumstances", "unless it appears from the evidence" and "unless the circumstances are such as to indicate a lack of . . ." See *Pigee* v *Israel*, 670 F2d 690, 693-695 (CA 7, 1982); *Jacks* v *Duckworth*, 651 F2d 480, 485-486 (CA 7, 1981), *cert den*, 102 S Ct 1010 (1982); *Rivera* v *Coombe*, 683 F2d 697 (CA 2, 1982); *Brayboy* v *Scully*, 695 F2d 62, 67 (CA 2, 1982).

[8]

Rock v *Coombe*, 694 F2d 908 (CA 2, 1982), *cert den*, 103 S Ct 1773 (1983); *Mancuso* v *Harris*, 677 F2d 206 (CA 2, 1982); *Tweety* v *Mitchell*, 682 F2d 461 (CA 4, 1982).

These courts properly recognize that a contextual interpretation consistent with the principles of *Cupp* v *Naughten*, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1972), is essential to evaluations of a claimed *Sandstrom* violation. Courts on review must assume that jurors will endeavor to effectuate all the trial judges' instructions in a common sense manner. Undue, legalistic emphasis on narrow portions of the charge is artificially contrary to this realistic assumption.

With these matters in mind, a review of the precise language used in this case reveals a far less detrimental charge than the one found erroneous in *Sandstrom*. The court presented the presumption as a "rule of thumb" and equated it to the "old saying" that actions speak louder than words. The court couched the remainder of the intent instructions in permissive terms. Specifically, the court advised the jury that they might properly consider the use of a deadly weapon, the number and locations of the wounds and the manner of their infliction. 13a-14a. The instruction concluded with an admonition that the jury "*may* consider *all* of these things in determining whether or not there was an intent to kill in this case". 14a.

Even the Sixth Circuit opinion tacitly acknowledged that the charge left the ultimate determination of intent to the jury. It is highly unlikely that a lay juror would interpret a "rule of thumb" as a *mandatory* directive particularly when followed immediately by an emphasis on the permissive aspect of their decision-making process. By definition, rules of thumb are only roughly accurate methods of procedure based on common sense and experience. See *Websters* Third New International Dictionary, p. 1986. They are useful as a guide in the absence of anything more precise. For these reasons, Petitioner submits that no reasonable juror would have interpreted the instruction at issue as mandatory.

Absent a mandatory character, the question remains whether the instruction in this case could have been interpreted as burden shifting. This Court, however, has recognized a distinction between presumptions that simply shift the burden of production as opposed to the ultimate burden of persuasion. *County Court of Ulster County, supra*, 442 US at 157, n. 16. In this case any doubts relevant to the ultimate burden generated by the rule of thumb language should have been resolved by the Court's specific reminder of the reasonable doubt standard at the conclusion of the intent instruction. But if any confusion was left, a reasonable juror would have logically turned to the Court's explanation of the sanity presumption for guidance. This latter instruction defined a legal presumption as shifting only the minimal burden of production.[9] It also correctly placed the burden of persuasion on the state.

For these reasons, Petitioner submits that the instruction at issue in this case did not violate *Sandstrom*. But, even if

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[9]

The court's instruction reads as follows:

> The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt of insanity, the state has the burden of proving sanity beyond a reasonable doubt.

18a.

Insanity was initially raised but then abandoned in *Sandstrom*. Thus an instruction similar to the above was not given. In effect, such instruction informed the jury that the presumption becomes inoperative upon introduction of any contrary evidence.

The issue, as one commentatory has noted, is the juror's understanding of the judge's utterances. Allen & DeGrazia *The Constitutional Requirement of Proof Beyond a Reasonable Doubt: A Comment Upon Incipient Chaos in the Lower Courts*, 20 Am. Crim. Law R. (1982) 1, 15. It is unlikely that reasonable jurors would isolate and then ignor

review reveals the possibility of juror misinterpretation sufficient to invoke *Sandstrom*, the above analysis illustrates the importance of complete contextual interpretation and is helpful to define the potential for prejudice. Petitioner submits that such potential is demonstrably less in this case than appears in either *Sandstrom* or *Connecticut* v *Johnson*.

B. Degree of Emphasis

Where constitutional error receives particular prominence at trial, the possibility of harmlessness diminishes. In *Bollenbach* v *United States*, 326 US 607; 66 S Ct 402; 90 L Ed 350 (1946), for example, the last thing a potentially deadlocked jury heard was an unconstitutional presumption as an answer to their specific request for guidance on the issue. Similarly, the "machine gun repetition" of *Griffin* v *California*, *supra*, violations was highly significant to the nonharmless error determination in *Chapman*, *supra*, 386 US at 27.

In this case, the alleged constitutional violation involves a single terse sentence buried in twenty-eight pages of instructions that took the court approximately fifty-four minutes to read. This instruction, moreover, was in the nature of a introductory or prefatory remark. In these circumstances, there is no basis for a conclusion that a jury would accord special significance to this comment.

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judicial remarks on the same general topic. As a rational and accurate description of the fact finding process the explanation of presumption of insanity is the functional equivalent of a proper judicial comment on the evidence intended to appraise the jury of the implications of facts proved at trial. See Allen *Structuring Jury Decision Making In Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*. 94 Harv. L. Rev. (1982), 321, 335. It thus significantly reduces the ambiguity of the challenged instruction.

C. **Materiality of the Intent Issue**

A pluarlity of this Court in *Connecticut* v *Johnson* suggested that a *Sandstrom* error might be harmless where the trial defense effectively concedes the issue of intent. To various degrees, other courts have also focused the primary emphasis of their harmless error inquiry on whether intent was a disputed or material issue in the case. See *Conway* v *Anderson*, 698 F2d 282, 285 (CA 6, 1983) (and cases cited therein); *McGuinn* v *Crist*, 657 F2d 1107, 1109 (CA 9, 1981); *United States* v *Winter*, 663 F2d 1120, 1144-1145 (CA 1, 1981).

A reasonable harmless error approach is to simply examine the degree to which intent was a significant issue in the case. Where intent, though technically in dispute, was clearly subsidiary to another claim of defense, the likelihood of harm from a *Sandstrom* instruction decreases dramatically. The contrary requires a speculative assumption that a jury which rejects a hotly contested defense claim will then base conviction on ambiguous instructional language.

The case at bar is illustrative. Here the defense claimed temporary insanity based on alcoholism. Under then applicable Michigan law the defense had to establish that, due to mental disease, defendant either (1) was not capable of knowing he was doing wrong, or (2) lacked the power to resist the impulse to violate the law. *People* v *Finley*, 38 Mich 482, 483 (1878). *People* v *Martin*, 386 Mich 407, 418; 192 NW2d 215 (1972). Temporary or emotional insanity, like voluntary intoxication, was not recognized as a defense in the sense that it could negate general criminal intent. Id., at 484; *People* v *Wright*,

58 Mich App 735, 739; 228 NW2d 807 (1975).[10] In this case the defense never disputed or challenged the prosecution's proofs as to general criminal intent, but instead sought to demonstrate the irresistible impulse prong of the Michigan insanity defense. Counsel's final argument to the jury made no mention of intent. Instead, counsel argued that defendant:

> . . . was so possessed, so determined to destroy the symbol that represented destruction of his world, that he had such an irresistible impulse and couldn't control it and had no willpower to stop himself, that once this impulse took over in his own mind it just carried him foward, (sic) and *he did what was the only thing in his mind* at that point, to destroy this object without regard to who the object was or what their past relationships were or for the consequences and the future, the loss of his family, the destruction of his own life—this didn't mean anything—the only thing that meant something was where is the object—I've got to destroy the object—and that's what happened.
>
> 618-619. (Emphasis added)

In this context a *Sandstrom* instruction on intent would have been virtually meaningless to a lay jury.

D. Weight of the Evidence

Closely related to the materiality of the intent issue is the scope and extent of the proofs presented on this issue at trial.

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[10]

In 1975, the Michigan legislature abandoned the *M'Naghten* rule (Daniel M'Naghten's Case 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843)) and the irresistible impulse test in favor of the Model Penal Code test for criminal responsibility. 1975 PA 180 [MCL 768.21a(1); MSA 28.1044(1)(1)].

Frequently the reason for nondispute lies in an accurate assessment of the prosecution's case.

Petitioner again does not assert that the weight of the evidence is the sole test for harmless instructional error. It is simply an important step, *Holloway* v *Arkansas*, 435 US 475, 488; 98 S Ct 1173; 55 L Ed 2d 426 (1978), in the assessment of ". . . the probable impact of the [error] on the minds of an average jury." *Harrington* v *California*, 395 US 250, 254; 89 S Ct 1726; 23 L Ed 2d 284 (1969). This step is especially crucial where the apparent error rests on the mere possibility of juror misinterpretation.[11]

In this case defendant's words and conduct left no doubt as to his intentions. He announced his intent to kill upon arrival at the plant, diligently sought the person who had discharged him and carefully shot this individual four times. He immediately surrendered and admitted the homicide in detail.

Any reasonable juror who believed defendant had shot the decedent and was not legally insane at the time could not possibly conclude that he lacked the requisite general intent. An ambiguous intent instruction pales to insignificance where the evidence itself is conclusive.

---

[11]

Despite suggestions to the contrary, a factual inquiry of this nature does not invade the province of the jury. R. Traynor *The Riddle of Harmless Error* (1970) p. 13; Note *Harmless Constitutional Error: A Reappraisal* 83 Harv. L. Rev. (1970) 814, 819. The issue is whether the error influenced the verdict or contributed to the conviction, *Fahy, supra*, 375 US at 86-87, not whether the reviewing court would reach the same result.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 83-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THEODORE KOEHLER, Warden,
Petitioner,

v.

TILDEN N. ENGLE,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether, assuming the state's retroactivity argument is considered despite the failure to raise it below, *Sandstrom* at least should apply retroactively to habeas cases in which the constitutional issue was raised in state court on direct review prior to *Sandstrom's* decisional date?

II. Whether Michigan has any procedural default rule barring consideration of defendant's habeas claim?

III. Whether presumed intent instructions which shifted the burden of persuasion to defendant on disputed factual issues can be harmless error?

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COUNTER-STATEMENT OF THE CASE

Defendant was charged with willful, deliberate and premeditated murder.[1] At trial he flatly denied ever intending to kill the Deceased (263). He testified that for three days preceeding the killing, he drank almost continuously, consuming at least three fifths and several pints of whiskey plus beer (250-258). In addition, late on the afternoon of the third day, he ingested four librium pills, quadruple his prescribed dosage (256-258, 302). The next thing he fully recalled was waking up in jail (258). Of the interim he could only remember that "fur was flying in my face and I saw a man as if I saw Lantz [the Deceased], as if in a nightmare on the floor with the blood gushing from his mouth" (258). He did not deny shooting the Deceased, but steadfastly maintained that he had not known what he was doing (314-315).

Dr. Mary Ansley testified for the defense that as a result of mounting stress during the months preceeding the shooting, including the deaths of five close family members or friends, a suicide attempt by his wife and finally the loss of his job, Defendant had suffered a dissociative reaction mental breakdown on the night of the shooting (353-359). She testified that when such breakdowns occur, they are often accompanied by impaired perception, judgment and consciousness (357-358). She testified that while it was possible he knew what was happening when he shot the Deceased, in her judgment the combination of the alcohol and the severe mounting stresses he had experienced were sufficient to have blocked his consciousness to the point that he would not have been fully aware of what he was doing (359-360).

---

[1] Michigan Compiled Laws § 750.316; Michigan Statutes Annotated § 28.548.

Defendant's nephew, Renus Engle, testified that when Defendant indicated at approximately 9:00 PM that he was going to kill a guy, he was not acting normally (I, 21).[1] He was crying, had a nervous pitch to his voice and the things he was saying did not make much sense (I, 21-26). When Renus tried to talk to him, he did not seem to be paying attention (I, 26). Never before had Renus seen Defendant acting this way (I, 21-22).

Donald Ambrose, a plant clerk, testified that when he told Defendant at approximately 9:35 PM that the Deceased was not in the office, Defendant just stood there looking at him until the phone rang, at which point Defendant said he would go find him (39-41). Ambrose was struck by the way Defendant said this without any hint of anger in his voice or demeanor and by the strange look in his eyes (47-48, 56). In Ambrose's words, he looked "so strange" (47). While not smelling any alcohol, Ambrose testified that Defendant looked like he might have been drinking (53).

William Richardson, an employee on the line, testified that Defendant and the Deceased engaged in what appeared to be a normal conversation for approximately five minutes before Defendant pulled out a gun and started firing (24-27). Richardson testified that his attention was drawn to Defendant just before the first shots were fired by the "strange" look in Defendant's eyes, a look which Richardson testified he had never seen before during the four years he had worked with Defendant (24-26).

---

[1] The roman numeral "I" refers to a separately numbered transcript of the proceedings on July 6, 1973. The remainder of the transcripts are consecutively numbered and will be referred to by page number only.

Donald Ambrose testified that soon after hearing the shots, Defendant appeared in the office doorway with the gun just hanging from his hand (41-42, 49). He was quiet and sad, his movements were slow and he appeared confused (52). When security guard Samuel Mays arrived, Defendant voluntarily turned the gun over to him (43, 66). Mays testified that Defendant smelled of alcohol and was visibly unsteady on his feet (67, 77).

Detroit Police Officer Richard Ren arrived at the scene at 10:55 PM, approximately an hour after the shooting occurred (112). He testified that Defendant appeared too calm and emotionless for what had transpired (94-95). While admitting the shooting, Defendant said he came to the plant to try and get his job back and had neither intended nor planned to shoot the Deceased (107, 118-119).

Defendant testified at trial that he regularly carried the gun used in the shooting for self-protection following the shooting death of his best friend during a robbery in a nearby bar a few months earlier (208-212). He testified that he had no recollection of talking to Officer Ren at the scene and that the purported confession he gave the next day was composed by the interrogating officer (261, 307-311, 319-320). He testified that he was so sick with the shakes at the time that he did not know what it said when he signed it (320).

Defendant's brother testified that Defendant drank heavily following their mother's death, attempted suicide on at least one occasion and had been hospitalized for alcoholic seizures (542-545, 551-553).

Defense counsel argued in closing that Defendant had not planned to shoot the Deceased, was not really "there" when the shooting occurred and did not know right from wrong at the time, in addition to arguing that he had been possessed by an irresistible impulse (590, 614, 618-619).

Among the questions to which the prosecutor specifically addressed himself in closing were whether Defendant was so intoxicated that he lacked the specific intent necessary to sustain a conviction for willful, deliberate and premeditated murder and whether he knew right from wrong at the time (568-570, 577, 622). As outlined by the judge in his instructions, the questions facing the jury included whether defendant had been capable of forming a premeditated intent to kill and whether he knew what he was doing when he shot the Deceased (15a-18a).

On three separate occasions during closing arguments, the prosecutor urged the jury to rely on Defendant's acts in determining his intent, specifically referring on the last occasion to the presumption that "men are accountable for the reasonable consequences of their acts":

> "Look at his actions. Do his actions demonstrate the actions of somebody who didn't know what he was doing" (577).
>
> "How do you know what is in a man's mind? You don't—you—the only way you know what is in a man's mind is by looking at what he has done, the way he did it" (622).
>
> "[M]en are accountable for the reasonable consequences of their acts. If that be so, Tilden Neil Engle is account[able]" (635).

Regarding the question of intent, the judge instructed the jury that:

> "We of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" (13a).

After less than 90 minutes of deliberations, the jury returned a verdict of guilty as charged of willful, deliberate and premeditated murder (683-684).

Following affirmance of his conviction by the Michigan Court of Appeals,[3] Defendant wrote a pro se letter to the Michigan Supreme Court requesting the appointment of counsel to pursue his appeal. The request was granted, and the State Appellate Defender Office was appointed to prepare a delayed application for leave to appeal.[4] On July 6, 1977 counsel filed an application and brief in support raising the constitutional claim at issue here (22a-30a). On May 2, 1978 the Michigan Supreme court denied leave to appeal.[5] In order to shield against any argument that state remedies had not been exhausted, counsel refiled the same claim back in the Michigan Court of Appeals, which denied leave on August 30, 1978 "for lack of merit in the grounds presented."[6] Counsel thereupon refiled the claim in the Michigan Supreme Court.

On January 8, 1979 this Court granted certiorari in *Sandstrom* v. *Montana*, 439 US 1067; 99 S Ct 832; 59 LEd 2d 31 (1979). On March 5, 1979 the Michigan Supreme Court again denied Defendant leave to appeal on his constitutional claim.[7] On June 18, 1979 this Court issued its opinion in *Sandstrom*.

SUMMARY OF ARGUMENT

I. The State's argument that *Sandstrom* v. *Montana*, 442 US 510; 99 S Ct 2450; 61 LEd 2d 39 (1979), should not apply retroactively to Defendant's case was not raised in either the District Court or the Sixth Circuit and there-

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[3] *People* v. *Engle*, 61 Mich App 628; 233 NW2d 116 (1975).

[4] Unpublished Order, April 26, 1976. See Respondent's Brief in Opposition to Petition for a Writ of Certiorari, p 3a.

[5] *People* v. *Engle*, 402 Mich 929 (1978).

[6] Unpublished Order, August 30, 1978 (35a).

[7] *People* v. *Engle*, 406 Mich 870 (1979).

fore is not properly before this court. If the argument nevertheless is considered, it should be rejected at least for habeas cases like Defendant's in which the *Sandstrom* claim was raised in state court on direct review prior to *Sandstrom's* decisional date. No "principled reason", *United States* v. *Johnson*, 457 US 537, 547; 102 S Ct 2579; 73 LEd 2d 202 (1982), exists for treating such defendants differently than their counterparts whose cases by chance alone were still pending on direct review when *Sandstrom* was decided. Under the pre-*Johnson* three factor retroactivity balancing approach, *Sandstrom* should be given complete retroactive effect. Conclusive or burden-shifting presumed intent instructions relieve the prosecution of its burden of proving each element of the crime charged beyond a reasonable doubt and raise substantial questions regarding the reliability of the guilt-determining process. Past reliance on such instructions was not justified given the clear warning signs that they could not pass federal constitutional muster, and the effect on the administration of justice of applying *Sandstrom* retroactively has been grossly exaggerated.

II. Consistent with Michigan's established policy of liberally excusing procedural defaults, the Michigan Supreme Court has held that no contemporaneous objection need be made at trial to preserve *Sandstrom* errors for review. *People* v. *Wright and Perez*, 408 Mich 1, 30, n. 13; 289 NW2d 1 (1980). Both the Michigan Supreme Court and Court of Appeals have applied this rule to pre as well as post-*Wright* trials, and Michigan has no appellate procedural default rule barring consideration of claims not raised in the initial appeal as of right to the Court of Appeals.

III. Given the clear shift in the burden of persuasion which the presumed intent instructions in this case entailed, the degree of emphasis placed on the presumption

of intent by the prosecutor in his closing arguments, the materiality of the issue of intent and the presence of conflicting evidence on that point, the instructions were not harmless, regardless of which of the two competing approaches advocated by the plurality opinions in *Connecticut* v. *Johnson*, ___ US ___; 103 S Ct 969; 74 LEd 2d 823 (1983), is adopted.

ARGUMENT

I. Sandstrom At Least Should Apply Retroactively To Habeas Cases In Which The Constitutional Issue Was Raised In State Court On Direct Review Prior To *Sandstrom's* Decisional Date.

The State did not argue in either the District Court or the Sixth Circuit that *Sandstrom* v. *Montana*, 442 US 510; 99 S Ct 2450; 61 LEd 2d 39 (1979), should not apply retroactively to Defendant's case. That argument appears for the first time in the State's petition for certiorari. Absent exceptional circumstances, a claim not raised below will not be considered by this Court. E.g., *United States* v. *Lovasco*, 431 US 783, 788, n. 7; 97 S Ct 2044; 52 LEd 2d 752 (1977). In *United States* v. *Ortiz*, 422 US 891; 95 S Ct 2585; 45 LEd 2d 623 (1975), this Court refused to consider a belated retroactivity argument for this reason. *Id.*, 898. No exceptional circumstances have been demonstrated by the State that would justify departure from this well established rule, and the Court therefore should decline to consider the issue.

If considered, the State's argument should be rejected at least for habeas cases like Defendant's in which the *Sandstrom* issue was raised in state court on direct review prior to *Sandstrom's* decisional date.* No principled

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*As defined by this Court, direct review includes not only any appeal as of right to a state's intermediate appellate court, but also

basis exists for distinguishing between such defendants and those whose cases were pending on direct review when *Sandstrom* was decided.[9]

In *United States* v. *Johnson*, 457 US 537; 102 S Ct 2579; 73 LEd 2d 202 (1982), this Court took "the first step toward 'turning our backs on the ad hoc approach that has so far characterized our decisions in the retroactivity field and proceeding to administer the doctrine on principle'." *Id.*, at 562. The Court rejected the three factor balancing approach urged by the State here, which had resulted in such "a welter of incompatible rules and inconsistent principles", *id.*, at 546, and held that henceforth any decision construing the Fourth Amendment would be applied to all cases still pending on direct review when the decision was rendered. *Id.*, at 562. This reform has since been extended to Fifth Amendment decisions. *Mack* v. *Oklahoma*, ___ US ___; 103 S Ct 201; 74 LEd 2d 161 (1982).

One of the central themes sounded throughout *Johnson* was that of "[e]venhanded justice for similarly situated litigants". *Id.*, at 547, n. 10. Quoting from Justice Harlan's dissent in *Desist* v. *United States*, 394 US 244; 89 S Ct 1030; 22 LEd 2d 248 (1969), the Court stated:

> "[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a

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discretionary review by the state's highest court and this Court. See *United States* v. *Johnson*, 457 US 537, 542, n. 8; 102 S Ct 2579; 73 LEd 202 (1982). Defendant's constitutional claim was raised in his first discretionary appeal to the Michigan Supreme Court (22a-30a).

[9] *Sandstrom* already has been applied retroactively to cases pending on direct review when it was decided. E.g., *Heads* v. *Louisiana*, 444 US 1008; 100 S Ct 654; 62 LEd 2d 637 (1980), *Moye* v *Connecticut*, 444 US 983; 100 S Ct 199; 62 LEd 2d 129 (1979), *Whisenhunt* v. *Georgia*, 443 US 903; 99 S Ct 3094; 61 LEd 2d 871 (1979).

> principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Johnson, supra* at 457 US 547-548.

Adherence to this fundamental precept requires that habeas petitioners who raised a *Sandstrom* claim on direct review in state court prior to *Sandstrom's* decisional date be granted the same relief as their counterparts whose cases by chance alone were fortunate enough to still be pending on direct review when *Sandstrom* was decided. There is no "principled reason" for distinguishing between these two groups of litigants. See Schwartz, *Retroactivity, Reliability And Due Process: A Reply to Professor Mishkin*, 33 University of Chicago Law Review 719, 731-734 (1966). As stated by this Court in *Johnson*, referring to all cases still on direct review:

> "If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it *nor should we affirm those which have rejected the very arguments we have embraced.*" *Id.*, at 457 US 555 (Emphasis added).

The unprincipled and inequitable nature of distinguishing between habeas and direct review litigants, all of whom have raised the same constitutional issue in state court on direct review, is sharply illustrated by this Court's recent decision in *Connecticut* v. *Johnson*, ___ US ___; 103 S Ct 969; 74 LEd 2d 823 (1983). In that case the defendant filed his appeal in state court in 1976, seven months before Defendant here raised his *Sandstrom* claim in the Michigan Supreme Court. Due to a problem in obtaining a complete transcript, however, the case was not argued until 1981. *Id.*, at 74 LEd 2d 829. Solely because of this freak delay, the case was pending on direct review when *Sandstrom* was decided. To apply *Sand-*

strom to such a case but not to Defendant's based on so fortuitous a circumstance would represent a serious departure from the norms of principled adjudication which this Court embraced in *Johnson*.

In addition to being unprincipled and unfair, such a distinction would provide a strong disincentive to the prompt and efficient litigation of appellate cases through the state courts. Defense attorneys would be well-advised to delay the direct appeal as long as possible through the use of new trial motions, motions for rehearing and the like so that if a favorable constitutional decision comes down, their client will be entitled to its benefit. Instead of promoting the prompt and final resolution of criminal cases, such a distinction would encourage further delay in a system that is already justly criticized as ponderously slow.

Legitimate concerns regarding the finality of criminal cases have prompted several past and current members of this Court to express the view that new constitutional decisions generally should not apply at all to habeas corpus cases. *Hankerson* v. *North Carolina*, 432 US 233, 246-248; 97 S Ct 2339; 53 LEd 2d 306 (1977). (Powell, J., concurring in the judgment), *Mackey* v. *United States*, 401 US 667, 675-695; 91 S Ct 1160; 28 LEd 2d 404 (1971) (Harlan, J., concurring in the judgment). Many of the concerns which have prompted these views lose much of their force, however, in cases such as this where the habeas petitioner has raised his constitutional claim in the state court on direct review. Not only is the number of petitioners fitting this category likely to be small, but in addition the most troublesome finality concern, that a prisoner may continually seek to relitigate his conviction on new grounds never before raised each time a new constitutional decision is announced, *Desist* v. *United*

States, *supra* at 394 US 261 (Harlan, J., dissenting), is not implicated.[10]

Instead of a step back into the morass of prior retroactivity law, the Court should take another step forward toward principled and evenhanded decision-making by holding that *Sandstrom* at least should apply retroactively to any case in which the constitutional issue was raised in state court on direct review prior to *Sandstrom's* decisional date. There is no principled basis for doing otherwise.

A more thorough analysis of the three factor balancing approach than that undertaken by the State in its brief establishes that under pre-*Johnson* retroactivity law *Sandstrom* should be given complete retroactive effect. Jury instructions creating conclusive or burden-shifting presumptions on an essential element of the crime substantially impair the reliability of the guilt-determining process and do raise serious questions about the accuracy of past cases in which they were given. Moreover, any reliance by state courts on the continuing validity of such instructions long has been unjustified given the clear warning signs that such instructions could not pass federal constitutional muster. The effect on the administration of justice of applying *Sandstrom* retroactively also has been grossly exaggerated.

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[10] Other concerns, such as the necessity of releasing prisoners for constitutional violations unrelated to their guilt or innocence, *Hankerson* v. *North Carolina*, *supra* at 432 US 246-248 (Powell, J., concurring in the judgment), are more properly analyzed as questions regarding the scope of the Great Writ than as questions of retroactivity law. See *Stone* v. *Powell*, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).

The State's argument that conclusive or burden-shifting instructions such as those condemned in *Sandstrom* do not substantially impair the reliability of the guilt-determining process because such instructions only raise a possibility that the jury's deliberative process was infected ignores the recognized probability that most jurors in fact would rely on the unconstitutional presumption. As this Court has twice noted, given a choice between relying on a presumption and the more difficult task of analyzing and evaluating the evidence, "there is no reason to believe the jury would have deliberately undertaken the more difficult task." *Sandstrom*, *supra* at 442 US 526, n. 13; *Connecticut* v. *Johnson*, *supra* at 74 LEd 2d 333 (Opinion of Blackmun, J.). The mere possibility that some jurors might not interpret the instructions in an unconstitutional manner is not sufficient to reduce the danger the instructions pose to an acceptable level. *Sandstrom*, *supra* at 442 US 519. In every prior case where a conclusive or burden-shifting instruction was given, the probability that it infected the jury's deliberative process is substantial.[11]

The devastating effect of such instructions is to relieve the prosecution of its constitutional burden of proving each element of the crime charged beyond a reasonable doubt. As stated by this Court in *In re Winship*, 397 US 358; 90 S Ct 1068; 25 LEd 2d 368 (1970), the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error" which provides "concrete substance for the presumption of

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[11] The Government's companion argument that such instructions could have an adverse effect on the deliberative process only where the issue of intent was closely drawn is a harmless error argument which has no analytical relevance to the question whether *Sandstrom* should be applied retroactively.

innocence—that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.*, at 397 US 363. When these vital safeguards are not rigorously observed, substantial doubts about the reliability of the guilt-determining process arise.

While the instructions condemned in *Sandstrom* may be less egregious than the explicit burden-shifting instructions in *Mullaney* v. *Wilbur*, 421 US 684; 95 S Ct 1881; 44 LEd 2d 508 (1975), they still pose a sufficient danger to the accuracy of past guilty verdicts to require that *Sandstrom* be accorded full retroactive effect. The line which the State attempts to draw between cases like *Mullaney*, which have been held fully retroactive,[12] and cases like *Sandstrom* is too fine given the context in which we are dealing—jury instructions affecting the prosecution's burden of proof beyond a reasonable doubt and, concomitantly, the presumption of innocence. *Sandstrom's* major purpose was to eliminate a practice which did substantially impair the reliability of the guilt-determining process and it therefore should be accorded full retroactive effect.[13]

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[12] *Hankerson* v. *North Carolina*, 432 US 233; 97 S Ct 2339; 53 LEd 2d 306 (1977). See also *Ivan V* v. *City of New York*, 407 US 203; 92 S Ct 1951; 32 LEd 2d 659 (1972), holding *In re Winship*, *supra*, fully retroactive.

[13] As the State concedes in its brief, all of the circuits which have addressed this issue have reached this result. Brief for Petitioner, p 10, n. 1. See *Guthrie* v. *Warden, Maryland Penitentiary*, 683 F2d 820, 823, n. 3. (CA 4, 1982), *Burton* v. *Bergman*, 649 F2d 428, 431, n. 3 (CA 6, 1981), vacated and remanded on other grounds, 456 US 953; 102 S Ct 2026; 72 LEd 2d 478 (1982), *Dietz* v. *Solem*, 640 F2d 126, 130 (CA 8, 1981).

Due regard for past reliance on conclusive or burden-shifting presumed intent instructions does not dictate a contrary result. Such reliance is entitled to weight only if justified, *Brown* v. *Louisiana*, 447 US 323, 335; 100 S Ct 2214; 65 LEd 2d 159 (1980) (Opinion of Brennan, J.), *Berger* v. *California*, 393 US 314, 315; 89 S Ct 540; 21 LEd 2d 508 (1969), and here it clearly was not. Long before Defendant's trial, in *Morissette* v. *United States*, 342 US 246; 72 S Ct 240; 96 LEd 288 (1952), this Court thoroughly condemned presumed intent instructions:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.
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> * * *
>
> It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.
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> * * *
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> A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudice a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary." *Id.*, at 342 US 274-275.

In the years following *Morissette*, the federal circuit courts of appeal repeatedly struck down conclusive and

burden-shifting presumed intent instructions analagous to those given in this case and *Sandstrom*. E.g., *Mann* v. *United States*, 319 F2d 404, 407-409 (CA 5, 1963), *Chappell* v. *United States*, 270 F2d 274, 279-280 (CA 9, 1959), *Wardlaw* v. *United States*, 203 F2d 884, 887 (CA 5, 1953). And in 1970 in *In Re Winship*, *supra*, this Court made clear that the requirement that the prosecution prove each element of the crime charged beyond a reasonable doubt was fully applicable against the states through the Due Process Clause of the Fourteenth Amendment. *Id.*, at 397 US 363-364.

Together these decisions gave more than fair warning that presumed intent instructions could not pass federal constitutional muster. This was recognized in Michigan as early as 1971, two years before Defendant's trial commenced. *People* v. *Pepper*, 36 Mich App 437, 447-451; 194 NW2d 67 (1971), (Levin, J., dissenting), reversed 389 Mich 317; 206 NW2d 439 (1973), *People* v. *Morrin*, 31 Mich App 301, 316-317 and accompanying footnotes; 187 NW2d 434 (1971). Courts which nevertheless continued to approve of and rely on such instructions did so without justification and cannot now claim a good faith reliance interest entitled to serious weight.

The effect on the administration of justice of applying *Sandstrom* retroactively also does not dictate a contrary result. The class of cases in which *Sandstrom* will require reversal is exceedingly narrow. First, the defendant must have elected to go to trial rather than plead guilty.[11] Second, the defendant must have chosen to be tried by a jury rather than by the court. Third, intent must have

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[11] As this Court has noted, studies estimate that as few as 15% of all felony defendants choose to take their case to trial. *Brady* v. *United States*, 397 US 742, 752, n. 10; 90 S Ct 1463; 26 LEd 2d 747 (1970).

been an essential element of the crime. Fourth, a *Sandstrom* type instruction must have been given. Fifth, the remainder of the instructions must not have contained curative language. Sixth, intent must have been an essential element of the crime of which the defendant was convicted. Seventh, state contemporaneous objection rules must not bar review. And eighth, under whatever harmless error test this Court adopts, the reviewing court must find that the error was not harmless. Together these hurdles will severely limit the number of cases in which a reversal will be required.

Lower courts will of course be required to review past cases brought before them to determine whether relief must be granted. If past experience is any guide, however, much of this work has already been completed. Typically, the number of collateral attacks generated by a new decision peaks in the years immediately following the decision and thereafter quickly declines. By the time this Court issues its decision in this case, nearly five years will have elapsed since *Sandstrom* was decided.

Given the extent to which a *Sandstrom* type instruction casts doubt on the reliability of the guilt-determining process, the highly dubious nature of any past reliance and the minimal additional burden on the administration of justice, under pre-*Johnson* retroactivity law *Sandstrom* should be accorded complete retroactive effect.

II. No Michigan Procedural Default Rule Bars Consideration Of Defendant's Habeas Claim.

Michigan long has applied a broad exception to its general procedural default rule that absent manifest injustice, the failure to object to an instruction at trial precludes appellate review. Where an erroneous or misleading instruction is given on an essential element of

the crime or a material aspect of the defense, the absence of a contemporaneous objection does not bar review. E.g., *People* v. *Lenkevich*, 394 Mich 117, 122-123; 229 NW2d 298 (1975); *People* v. *Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967); *People* v. *MacPherson*, 323 Mich 438, 447-453; 35 NW2d 376 (1949). As stated by the Michigan Supreme Court in *Lenkevich*, rejecting the prosecution's contention that a lack of sufficient prejudice and the absence of a contemporaneous objection required affirmance of the defendant's conviction:

> "The rule is well settled in this State that if an erroneous instruction is given on a material matter and the error is not corrected or cured in the charge such error must be regarded as prejudicial.
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> * * *
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> It is settled law of this State that the trial judge should instruct the jury in criminal cases as to general features of the case, define the offense and indicate that which is essential . . . to establish the offense even in the absence of a request." *Id.*, at 123.

This exception applies to erroneous instructions on intent. E.g., *People* v. *Bowen*, 10 Mich App 1, 18-20; 158 NW2d 794 (1968). And long before Defendant's constitutional claim was presented to the Michigan courts, the Michigan Supreme Court had held that no objection was required to preserve for review instructions which established a conclusive presumption or shifted the burden of proof to the defense. *People* v. *Guillet*, 342 Mich 1, 3-8; 69 NW2d 140 (1955) [conclusive presumption of intent], *People* v. *McCoy*, 392 Mich 231, 235; 220 NW2d 456 (1974) [burden-shifting alibi instructions].

Consistent with this established policy of liberally excusing procedural defaults, the Michigan Supreme Court held in its first case addressing *Sandstrom* that no con-

temporaneous objection was required at trial to preserve *Sandstrom* errors for review. *People* v. *Wright and Perez*, 408 Mich 1, 30, n. 13; 289 NW2d 1 (1980). Despite the absence of an objection at this pre-*Sandstrom* trial to burden-shifting instructions on presumed intent, the Court held that the standard for determining whether reversal was required was the ordinary harmless error test established by this Court in *Chapman* v. *California*, 386 US 18; 87 S Ct 824; 17 LEd 2d 705 (1967), not the manifest injustice standard applied in cases involving a procedural default. *Wright*, *supra* at 26-29. While the Court did indicate that one reason for its holding was to deter future use of the instructions, the Court did not limit application of its decision only to future cases. *Id.*, at 30, n. 13.

Subsequent Michigan cases directly contradict the notion that *Wright* only was intended to relax state procedural default rules for post-*Wright* cases. In *People* v. *Hawley*, 112 Mich App 784; 317 NW2d 564 (1982), cited by the State for the proposition that burden-shifting instructions given prior to *Wright* were subject to normal procedural default rules, Brief for Petitioner, p 17, the Michigan Court of Appeals did hold in a case involving a pre-*Wright* trial that the failure to object to such an instruction precluded relief in the absence of a miscarriage of justice. *Hawley*, *supra* at 787. The State fails to point out, however, that subsequently the Michigan Supreme Court reversed the Court of Appeals' decision by order, citing *Wright* and holding that the erroneous instructions were not harmless beyond a reasonable doubt. *People* v. *Hawley*, 417 Mich 975 (1983). This action cannot be reconciled with the State's position that *Wright* was only meant to apply to post-*Wright* cases.

The State's argument that Defendant's failure to raise his constitutional claim in his initial appeal as of right to the Michigan Court of Appeals constituted an additional default was never raised in either the District Court or the Sixth Circuit. It therefore is not properly before this Court. E.g., *United States* v. *Lovasco*, 431 US 783, 788, n. 7; 97 S Ct 2044; 52 LEd 2d 752 (1977), *United States* v. *Oritz*, 422 US 891, 898; 95 S Ct 2585; 45 LEd 2d 623 (1975). Even if it is considered, however, it is totally without merit.

In *People* v. *George*, 375 Mich 262; 134 NW2d 222 (1965), Brief for Petitioner, p. 15, the first case cited by the State in support of this argument, the Michigan Supreme Court only held that issues raised in the questions presented section of the defendant's brief but not argued in the body of the brief would not be considered. *Id.*, at 264. In *People* v. *Tubbs*, 64 Mich App 341; 236 NW2d 77 (1975), the only other case cited by the State, a single judge did suggest an initial appeal procedural default rule. *Id.*, at 344-348. The State neglects to mention, however, that this was only a concurring opinion. The majority refused to consider such a rule, noting that the Michigan Supreme Court earlier in the same case had specifically rejected it, and reviewed the issues raised in the defendant's delayed application for leave to appeal on the merits, despite the fact that they had not been raised in the initial appeal. *Id.*, at 342-343.

Recent Michigan decisions involving *Sandstrom* claims not raised at trial or in the initial appeal as of right confirm that no state procedural default rule bars consideration of Defendant's claim. In *People* v. *Gibson*, 417 Mich 909 (1983), the Michigan Supreme Court considered a delayed application for leave to appeal which raised a *Sandstrom* error for the first time. Nevertheless, the Court reman-

ded the case to the Court of Appeals by order for consideration of the issue on the merits. On remand, the Court of Appeals reversed. *People* v. *Gibson*, ___ Mich App ___; ___ NW2d ___ (No. 70122, publication granted Sept. 21, 1983). Regarding the lack of objection and the failure to previously raise the issue, the Court stated:

> "It should be noted that the defendant did not object to the trial judge's instructions, nor did she raise any such issue on appeal. This is understandable as the trial was conducted August 31, 1979, and *People* v. *Wright*, 408 Mich 1; 289 NW2d 1 (1980), was decided March 4, 1980." *Gibson*, *supra* at slip opinion p. 1.

Similarly, in *People* v. *Plozai*, 125 Mich App 107; ___ NW2d ___ (1983), the Michigan Court of Appeals considered a delayed application for leave to appeal which for the first time raised a *Sandstrom* claim. The Court addressed the issue on the merits and reversed, despite the defendant's failure to raise the issue in his initial appeal to that Court in 1973. *Id.*, at 109.

In *People* v. *Woods*, 416 Mich 581; 331 NW2d 707 (1982), cited by the State in support of its procedural default argument, Brief for Petitioner, p 17, the Michigan Supreme Court held as a matter of federal constitutional law that *Sandstrom* need not be given complete retroactive effect. *Woods*, *supra* at 615-622. The State cannot by appellate alchemy transform *Woods* into a state law decision on the applicability of Michigan's procedural default rules.

Absent a demonstration by the State that Michigan has an applicable procedural default rule barring consideration of Defendant's habeas claim, the cause and prejudice requirements of *Wainwright* v. *Sykes*, 433 US 72; 97 S Ct 2497; 53 LEd 2d 594 (1974), do not apply. *County Court of Ulster* v. *Allen*, 442 US 140, 147-154; 99 S Ct 2213; 60 LEd

2d 777 (1979). As concluded by the Magistrate below, there is "no indication" that the Michigan courts relied on any procedural default in rejecting Defendant's constitutional claim. Magistrate's Report, p 7, n 3.

III. The Trial Court's Presumed Intent Instructions Clearly Shifted The Burden Of Persuasion To Defendant On Disputed Factual Issues And Were Not Harmless Error.

The trial court's instruction that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" is not meaningfully distinguishable from the unconstitutional presumed intent instruction condemned by this Court in *Sandstrom* v. *Montana*, 442 US 510; 513; 99 S Ct 2450; 61 LEd 2d 39 (1979), that "the law presumes that a person intends the ordinary consequences of his voluntary acts."[13] As explained by Judge Contie for the unanimous panel in this case, a "rule of thumb" in common parlance is a directive that generally is to be followed unless grounds for departing from the rule are shown. *Engle* v. *Koehler*, 707 F2d 241, 245 (CA6, 1983). This colloquial and common sense phrasing of the instruction actually increased the risk of error by increasing the likelihood that lay jurors, unfamiliar and uncomfortable with legal jargon, would recall and rely on the presumption in their deliberations.

The unconstitutional effect of this presumed intent instruction was aggravated by the instruction a few lines before it that "malice is implied from any deliberate and cruel act against another person, however sudden," and by the instruction immediately following it that "[i]t is

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[13] According to Webster's a "rule of thumb" is "a rule based on experience or practice," and to "presume" is to "accept as true lacking proof to the contrary." Websters New World Dictionary (2d ed, 1972).

somewhat like the old saying that actions speak louder than words" (13a). The former was unqualifiedly stated as a conclusive presumption, and the latter reinforced the idea that intent should be determined from the nature of Defendant's acts. Given that Defendant's defense rested primarily on the "words" he and his psychiatrist had spoken at trial, this latter instruction was particularly devastating, and its colloquial phrasing again increased the likelihood that the jurors would remember and rely on it in their deliberations.

The remainder of the judge's charge on the question of intent did not ameliorate the unconstitutional effect of these instructions. To the contrary, the rest of the instructions specially directed the jury's attention to three undisputed facts in the case the natural consequence of which was death—the use of a deadly weapon,[16] the number and location of the wounds inflicted[17] and evidence of close range firing[18]—any one of which would have been sufficient to trigger the presumption of intent that the judge had just described (13a-14a). Read together with the reasonable doubt instruction which concluded this section of the judge's charge, a rational juror would almost certainly have concluded that proof of these acts was sufficient to raise a presumption of intent satisfying the prosecution's burden on this element unless defendant proved otherwise.

The instructions given regarding the defense of insanity further aggravated the error. The judge told the

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[16] A .38 caliber Smith and Wesson revolver (123-125).

[17] Four gunshot wounds, one each to the head, abdomen, back and arm (I, 37-44).

[18] The shot to the abdomen was fired at close range (I, 42-43).

jurors that the prosecution was entitled to a "presumption" that Defendant was sane, and then defined the quantum of evidence that must be introduced to overcome this presumption as evidence "creating a reasonable doubt of insanity:"

> "Now, in many criminal cases no question of insanity is ever raised because the Prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts. The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. *When evidence of sanity is introduced, creating a reasonable doubt of insanity, the State has the burden of proving sanity beyond a reasonable doubt.*" (18a, emphasis added).

Moreover, with regard to Defendant's particular defense of dissociative reaction mental illness, the judge told the jury:

> "Where this [condition] can be proved it would constitute a defense" (18a).

Instructions requiring that the accused "prove" his defense or introduce evidence "creating a reasonable doubt" on the issue before the prosecution will be put to its proofs do more than merely shift the burden of production. They shift the burden of persuasion and are unconstitutional. *Sandstrom, supra* at 442 US 515-518. Contrary to the State's assertion that the insanity instructions

cured any error, Brief for Petitioner, p 25, they in fact compounded it.[19]

Read in context, *Cupp* v. *Naughten*, 414 US 141; 94 S Ct 396; 38 LEd 2d 368 (1972), the judge's instruction that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" resulted in a more egregious constitutional violation than that in *Sandstrom*, with a correspondingly greater potential for prejudice.

This potential was magnified by the degree of emphasis placed on the presumption of intent by the prosecutor throughout his closing arguments. On no less than three separate occasions he urged the jury to rely on Defendant's acts in determining the question of intent, using language virtually identical to that which the judge would eventually use in his instructions (577, 622, 635). This confluence of prosecutorial arguments and judicial instructions carries a powerful synergistic impact which is almost certain to make a substantial impression on the jury.[20] Given this emphasis by the prosecutor, there is every reason to believe that the jury would have noted and relied on the presumption.

The potential for prejudice was further magnified by the fact that the existence of the requisite mens rea was

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[19] The judge's instructions regarding the defense of intoxication similarly established a presumption in the prosecution's favor. The judge told the jurors that:

> "[T]he law presumes the defendant to have intended the disturbance or obscuration of his faculties which followed his voluntary intoxication. He must be held to have purposely blinded his moral perception and set his will free from control of reason and he should, therefore, be held responsible, as well, for the vicious excesses of the will thus set free as for the acts done by its prompting" (15a).

[20] See Traynor, *The Riddle of Harmless Error* (1970), p 75.

one of the disputed factual issues with which the jury was confronted. Contrary to the State's assertion that the only question facing the jury was whether Defendant nad been possessed by an irresistible impulse, Brief for Petitioner, pp 27-28, Defendant flatly denied ever intending to kill the Deceased and the evidence presented, arguments of counsel and instructions by the judge squarely raised the issue of whether, as a result of drug and alcohol intoxication and a dissociative reaction mental breakdown, Defendant's conscious mind had been blocked to the point that he did not know what he was doing. If he did not know what he was doing, and hence did not know he was doing wrong, or if the jurors entertained a reasonable doubt on this subject, he was entitled under then prevailing Michigan law to an acquittal by reason of insanity on all charges. *People* v. *Martin*, 386 Mich 407, 415-419; 192 NW2d 215 (1972). The judge's instruction on presumed intent relieved the prosecution of its burden of proving the requisite mens rea beyond a reasonable doubt and thereby seriously prejudiced a fair consideration of this disputed factual issue. As stated by one Michigan Court under analogous circumstances:

> "The issue at trial was defendant's sanity at the time of the offense. Once raised, the burden was on the prosecution to prove defendant's sanity beyond a reasonable doubt. Although distinct, the issues of intent and sanity are sufficiently intertwined so that the trial court's instruction that 'you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts' and that 'that law presumes that every man intends the legitimate consequences of his own acts' could have effectively shifted the burden on the issue of sanity to the defendant. At worst, these instructions could have been considered by the jury as negating an insanity defense altogether." *People* v. *Broadnax*, 111 Mich

App 46, 49-50; 314 NW2d 522 (1981), lv den 412 Mich 936 (1982).

Fair consideration of the related question whether Defendant was too intoxicated to have formed a premeditated intent to kill was similarly prejudiced by the presumed intent instructions.

The potential for prejudice was further magnified by the presence of conflicting evidence regarding Defendant's mental state at the time of the shooting. As the Sixth Circuit correctly summarized the record:

> "Engle admitted that he killed Lantzy but denied having the requisite mens rea to sustain a murder conviction because of the combined effects of intoxication, the librium pills and mental disease. The evidence concerning these claims was conflicting. For instance, the petitioner and Dr. Ansley testified in a manner supporting the defense of dissociative reaction while Dr. Edgar testified to the contrary. To some witnesses, Engle appeared calm and coherent near the time of the shooting; to others he appeared to be distraught and possibly under the influence of alcohol." *Engle* v. *Koehler*, *supra* at 707 F2d 246.

Faced with such conflicting evidence, the danger that the jurors would turn to and rely on the presumption of intent to ease resolution of the dispute was great. There is "no reason to believe the jury would have deliberately undertaken the more difficult task" of evaluating the evidence when they could instead rely on the presumption. *Connecticut* v. *Johnson*, *supra* at 74 LEd 2d 833 (Opinion of Blackmun, J.); *Sandstrom* v. *Montanta*, *supra* at 442 US 526, n. 13.

Given the clear shift in the burden of persuasion that the presumed intent instructions entailed, the degree of emphasis placed upon the presumption of intent by the

prosecutor in his closing arguments, the material nature of the issue of intent and the presence of conflicting evidence on that point, it would "indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide." *Bollenbach* v. *United States*, 326 US 607, 614; 66 S Ct 402; 90 LEd 350 (1946).

When a jury "is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict." *Chapman* v. *California*, 385 US 18, 44; 87 S Ct 824; 17 LEd 2d 705 (1957) (Stewart, J., concurring in the result). As stated by Justice Frankfurther for the Court in *Bollenbach* v. *United States*, *supra*, rejecting the Government's argument that the evidence of guilt rendered harmless an unreasonable burden-shifting presumption:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . . *Id.*, at 326 US 614.[21]

The "weight of the evidence" approach urged by the State, Brief for Petitioner, pp 28-29, is totally inappropri-

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[21] See Traynor, *supra* at 73-74:

> "[W]e must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case. If an erroneous instruction or an erroneous failure to give an instruction relates to a substantial element of the appellant's case, an appellate court would not find it highly probable that the error did not influence the verdict."

ate where, as here, there is conflicting evidence on the issues to which the erroneous instructions relate. As stated by Justice Black for the Court in *Weiler* v. *United States*, 323 US 606, 611; 65 S Ct 548; 89 LEd 495 (1945):

> "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."[2]

The nearly unanimous weight of authority of those commentators who have addressed the question agree that a reviewing court which attempts to resolve such conflicts or affirms despite them on the basis of "overwhelming evidence" does exceed its proper and legitimate function. Traynor, *supra* at 20-22; Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process In Need of a Rationale*, 125 University of Pennsylvania Law Review 15, 32-35, 46-47, 53 (1976); Note, *Harmless Error: The Need for a Uniform Standard*, 53 St. John's Law Review 541, 560-561 (1979), Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 Journal of Criminal Law and Criminology 421, 429-430 (1980).

The ultimate resolution of the *Sandstrom* case itself provides an instructive analogy for how the case at bar should be resolved. As the District Court conceded in its opinion, the facts in *Sandstrom* and this case are "remarkably similar."[3] In *Sandstrom*, as here, the ac-

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[2] Accord, *Bumper* v. *North Carolina*, 391 US 543, 550, n. 16; 88 S Ct 1788; 20 LEd 2d 797 (1968), *Kotteakos* v. *United States*, 328 US 750, 763-764; 66 S Ct 1239; 90 LEd 1557 (1946).

[3] See District Court Opinion, Petition for Certiorari, p 6a.

cused confessed to the homicide.[4] The killing was admitted at trial, and the defense argued on the basis of psychiatric testimony and evidence of intoxication that the accused had not acted knowingly and purposefully. The jury rejected this argument and returned a guilty verdict on the charged offense of deliberate homicide. On the basis of a single one line presumed intent instruction less egregious under all the circumstances than the one given here, this Court reversed and remanded the case to the Montana Supreme Court for consideration of whether the erroneous instruction could be held harmless. On remand that Court unanimously held that it could not. Given that the accused's intent was the principal issue at trial and an essential element of the prosecution's proofs, the Court was unable to assert that "the offensive instruction could not reasonably have contributed to the jury's verdict." *State* v. *Sandstrom*, 184 Mont 391; 603 P2d 244, 245 (1979).

Regardless of which of the two competing approaches advocated by the plurality opinions in *Connecticut* v. *Johnson*, *supra*, is adopted, the error in this case was not harmless. The State cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, *supra* at 385 US 24. Under all the facts and circumstances, "there is a reasonable possibility that the [error] might have contributed to the conviction." *Id.*, at 23.

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[4] Sandstrom admitted striking the wheelchair bound victim in the back of the head with a shovel and then stabbing her five times in the back with a knife. U.S. Supreme Court Records and Briefs, Docket No. 78-5384, Appendix pp 10-11.

CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the Sixth Circuit be AFFIRMED.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

By: s/John Nussbaumer
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No. 83-1-CFH
Status: GRANTED

Title: Theodore Koehler, Warden, Petitioner
v.
Tilden N. Engle

Docketed:
July 5, 1983

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Caruso, Louis J.

Counsel for respondent: Nussbaumer, John

Entry	Date	Note	Proceedings and Orders
1	Jul 5 1983	G	Petition for writ of certiorari filed.
3	Jul 7 1983		Order extending time to file response to petition until August 23, 1983.
4	Aug 23 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Aug 23 1983		Brief of respondent Tilden N. Engle in opposition filed.
6	Aug 31 1983		DISTRIBUTED. September 26, 1983
8	Oct 3 1983		REDISTRIBUTED. October 7, 1983
9	Oct 11 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Oct 11 1983		Petition GRANTED.
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15	Nov 25 1983		Brief of petitioner Theodore Koehler, Warden filed.
16	Nov 25 1983		Joint appendix filed.
17	Dec 27 1983		Brief of respondent Tilden N. Engle filed.
18	Jan 4 1984		Record filed.
19	Jan 4 1984		Certified original record and joint appendix received.
20	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 28, 1984. (2nd case)
21	Jan 18 1984		CIRCULATED.
22	Feb 28 1984		ARGUED.